91-2037

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin, DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Petitioners,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and the SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a motion to vacate which questions whether a judgment is final under 28 U.S.C. § 1291 constitute a motion to amend or alter judgment within the meaning of Fed. R. Civ. P. 59(e) so as to require a second notice of appeal in order to confer appellate jurisdiction upon the court of appeals?

LIST OF PARTIES

The parties to this action are the State of Wisconsin; Tommy G. Thompson, Governor of the State of Wisconsin; Donald J. Hanaway, Attorney General of the State of Wisconsin at the time this action was commenced; David Vernon Penn, District Attorney of Vilas County, Wisconsin; Janet L. Marvin, District Attorney of Forest County, Wisconsin, at the time this action was commenced; Lac du Flambeau Band of Lake Superior Chippewa Indians and Sokaogon Chippewa Community.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS AND RULES INVOLVED 3

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON WHAT CONSTITUTES A MOTION TO ALTER OR AMEND A JUDGMENT UNDER RULE 59(e) 9

II. THE POLICY CONSIDERATIONS ENUNCIATED IN *WHITE* COUNSEL THAT THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE SEVENTH CIRCUIT'S HOLDING THAT THIS MOTION TO VACATE WAS A RULE 59(E) MOTION 15

CONCLUSION 17

Page

CASES CITED

Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc., 856 F.2d 873 (7th Cir. 1988) 11

Audi Vision Inc. v. RCA Manufacturing, 136 F.2d 621 (2nd Cir. 1943) 15

Buchanan v. Stanships, Inc., 485 U.S. 265 (1988) 11, 13

Charles v. Daley, 799 F.2d 343 (7th Cir. 1986) 10, 11, 13

Curlott v. Campbell, 598 F.2d 1175 (9th Cir. 1979) 15

Durkin v. Commissioner of Internal Revenue, 872 F.2d 1271 (7th Cir. 1989) 12, 13

Griggs v. Provident Consumer Discount Company, 459 U.S. 56 (1982) 9, 10

Harcon Barge Company v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986) 11, 13

Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) 10

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990) 2, 7

Page

Lac Du Flambeau Band of Lake
Superior Chippewa Indians
v. State of Wis.,
770 F. Supp. 480 (W.D. Wis. 1991) 2, 7

Lac Du Flambeau Band of Lake
Superior Chippewa Indians
v. State of Wis.,
957 F.2d 515 (7th Cir. 1992) 1-2, 10-11, 12

Lucas v. Florida Power & Light Co.,
729 F.2d 1300 (11th Cir. 1984) 12-15

Miller v. Transamerican Press, Inc.,
709 F.2d 524 (9th Cir. 1983) 12, 13, 14

Osterneck v. Ernst & Whinney,
489 U.S. 169 (1989) 11, 12, 13

West v. Keve,
721 F.2d 91 (3rd Cir. 1983) 11-15

White v. New Hampshire Department
of Employment Security,
455 U.S. 445 (1982) 10, 11, 13, 15

STATUTES CITED

25 U.S.C. § 2710(d)(7)(B)(iii) 7

25 U.S.C. § 2710(d)(7)(B)(vi) 8

25 U.S.C. § 2710(d)(7)(B)(v) 8

25 U.S.C. § 2710(d)(1)(B) 7

28 U.S.C. § 1291 ..... 3, 13-17

Page

28 U.S.C. § 2101(c) 2

28 U.S.C. § 1254 2

28 U.S.C. § 1988 10

RULES CITED

Fed. R. App. P. 4 4-7

Fed. R. App. P. 4(a)(4) 9-10

Fed. R. Civ. P. 59(e) 3, 9-13, 15-17

Fed. R. Civ. P. 58 7

Fed. R. Civ. P. 59 10

OTHER AUTHORITIES

16 C. Wright, A. Miller & E. Cooper,
Federal Practice and Procedure
§ 3950 (1991 Supp.) 10

No. _____

In The

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October Term, 1992

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin, DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, the State of Wisconsin, Tommy G. Thompson, Governor of the State of Wisconsin, Donald J. Hanaway, Attorney General of the State of Wisconsin at the time of this action, David Vernon Penn, District Attorney of Vilas County, Wisconsin, and Janet L. Marvin, District Attorney of Forest County, Wisconsin, at the time of this action, respectfully request that a writ of certiorari issue to review the March 23, 1992, decision and judgment of the Seventh Circuit Court of Appeals in *Lac Du*

Flambeau Band of Lake Superior Chippewa Indians v. State of Wis., 957 F.2d 515 (7th Cir. 1992).

OPINIONS BELOW

The district court denied the respondents' motion for preliminary injunction despite holding that the State of Wisconsin lacked jurisdiction to enforce its criminal gambling statutes on the reservation because the respondents did not have a tribal-state compact. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990). The district court denied petitioners' motion for summary judgment and entered judgment for respondents on June 18, 1991. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991).

The Seventh Circuit Court of Appeals dismissed the petitioners' appeal for lack of jurisdiction on March 23, 1992. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 957 F.2d 515 (7th Cir. 1992).

JURISDICTION

The judgment for which review is sought was entered on March 23, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254 and 2101(c).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1291:

> Final decisions of district courts
>
> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Civ. P. 59:

> New Trials; Amendment of Judgments
>
> . . . .
>
> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. R. App. P. 4:

Appeal as of Right--When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party; (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) [Effective until Dec. 1, 1991. See, also, subd. (a)(6) below.] A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(6) [Effective on Dec. 1, 1991. See, also, subd. (a)(6) above.] The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) [Effective on Dec. 1, 1991.] A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

On June 18, 1991, the district court entered a memorandum opinion and order (A.49) in this case denying petitioners' motion for summary judgment.[1] *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991). The court construed the provision of 25 U.S.C. § 2710(d)(1)(B) and held that all games involving prize, chance and consideration were "permitted" in Wisconsin within the meaning of that section of the Indian Gaming Regulatory Act. The court ordered the State to conclude a tribal-state Class III gaming compact with the respondent tribes within sixty days from the date of the order as provided in 25 U.S.C. § 2710(d)(7)(B)(iii). In conformity with Fed. R. Civ. P. 58, the court entered a judgment (A.46) on a separate document on June 21, 1991.

On June 27, 1991, respondent Lac du Flambeau filed a motion to vacate and set aside the judgment (A.44). The motion did not specify the rule upon which respondent relied or set forth any specific grounds for the relief requested. In the accompanying memorandum (A.37), the ground for vacation of the judgment was "[the tribe] believes the Court's June 18th Opinion and Order was interlocutory in nature and that entry of [the June 21, 1991] judgment was premature . . . ." Memorandum in support of motion to vacate (A.38).

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[1]The district court issued an earlier decision (A.66) denying respondents' request for an order enjoining the enforcement of Wisconsin's criminal statutes on respondents' reservations. The district court held that although the State lacked jurisdiction to enforce its gambling law against the respondents, an injunction was inappropriate because the respondents' activities were illegal under federal law without a tribal-state compact. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990).

In the argument, the tribe detailed the provisions of the statute authorizing appointment of a mediator. Both sides submit their last best offer to a court-appointed mediator if a compact is not concluded in the sixty day period of the district court's order. The mediator then selects one of the last best offers which best comports with the terms of the IGRA. 25 U.S.C. § 2710(d)(7)(B)(vi). The mediator then submits the selected compact to the State as a proposed tribal-state compact. 25 U.S.C. § 2710(d)(7)(B)(v). The tribe argued that the

> judgment at this time is premature for at least two reasons. First, the tribe, through this litigation, has sought the conclusion of a tribal/state compact. The litigation will not be completed until a compact is concluded. . . .
>
> . . . The second reason . . . is because the Court's powers may need to be invoked in order to select a mediator.

Memorandum in support of motion to vacate (A.39-40). The tribe conceded, however, that the district court's decision "disposed of a critical legal dispute between the parties, which should facilitate the conclusion of a compact." Memorandum in support of motion to vacate (A.39-40).

On July 17, 1991, petitioners filed a notice of appeal (A.12) from the judgment entered June 21, 1991.[2] The court denied the motion to vacate in an order (A.10) entered on July 22, 1991. In so denying, the district court held that the only actions remaining in the litigation were those required to execute the judgment. "The merits of all

---

[2] Based on the rules and case law, the defendants determined the motion to vacate did not toll the 30 day appeal period and noted that fact in a footnote on the notice of appeal.

the claims raised by the parties have been decided; the rights and liabilities of the parties have been determined . . . ." Order (A.10-11). No further notice of appeal was filed.

At the oral argument on February 19, 1992, the panel of the Seventh Circuit Court of Appeals raised a question of that court's jurisdiction over the appeal in view of Fed. R. App. P. 4(a)(4) and this Court's decision in *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982). The court requested the parties file simultaneous supplemental briefs addressing the jurisdictional question. On March 23, 1992, the Seventh Circuit issued its decision (A.1) and judgment (A.6) dismissing the appeal for want of appellate jurisdiction under Fed. R. App. P. 4(a)(4).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON WHAT CONSTITUTES A MOTION TO ALTER OR AMEND A JUDGMENT UNDER RULE 59(e).

Federal Rule of Appellate Procedure 4(a)(4) provides thirty days to appeal final orders. That period is tolled if a motion to alter or amend the judgment is filed pursuant to Fed. R. Civ. P. 59(e). The rule specifically provides that if a notice of appeal is filed before the entry of an order disposing of a Rule 59(e) motion, the notice of appeal is an

absolute nullity. *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982).

The question decided by the Seventh Circuit was whether the motion to vacate in this case was a motion to alter or amend a judgment within the meaning of Rule 59(e). The characterization of post-judgment motions has been a vexing problem because the selection of the rule upon which the motion is based determines appellate jurisdiction. Courts should determine whether post-judgment motions are motions to alter or amend the judgment under Rule 59(e) not by what they are called but by their function. *See* 16 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3950 at 414 (1991 Supp.).

This Court has indicated that "the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451 (1982). In *White* this Court held that a request for attorneys fees under 28 U.S.C. § 1988 was collateral to the main cause of action. The motion was "'unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment.'" *Id.* at 452, quoting from *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980). The motions mentioned in Rule 4(a)(4) and Rule 59 all seek substantive change in the final judgment.

The Seventh Circuit held that *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986),

> adopts a bright-line rule: "all substantive motions served within 10 days of entry of a

> judgment will be treated as based on Rule 59."

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis., 957 F.2d at 517.

In the *Charles* case, the Seventh Circuit adopted the Fifth Circuit "bright-line" rule citing *Harcon Barge Company v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (*en banc*). *See also Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc.*, 856 F.2d 873 (7th Cir. 1988). The Fifth Circuit, applying this rule, held that a motion to alter or amend the judgment which requested the allowance of costs was a Rule 59(e) motion under the *Harcon Barge Company* rule. This Court reversed, reiterating the statement in *White* that "'Rule 59(e) only . . . support[s] reconsideration of matters properly encompassed in a decision on the merits.'" *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267 (1988). Using this analysis, this Court determined that a post-judgment motion for costs was one which did not imply a change in the judgment but merely seeks what is due because of the judgment.

> [A] motion for costs filed pursuant to Rule 54(d) does not seek 'to alter or amend the judgment' within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply.

Id. at 268-69.

This Court has reiterated the "general framework for determining whether a postjudgment motion constitutes a Rule 59(e) motion to alter or amend the judgment" in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989).

This Court again held that motions which raise "legal issues 'collateral to the main cause of action'" or "wholly 'separate from the decision on the merits'" are not motions to alter or amend the judgment under Rule 59(e). *Id.*

The Seventh Circuit held:

> A motion to vacate the judgment in its entirety presents "matters encompassed within the merits of the underlying action."

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis., 957 F.2d at 517. This mechanical, albeit convenient, application of its "bright-line" rule disregards this general framework in favor of pigeon holing all motions to vacate as "substantive" without regard for the issues raised in the motion.

The decisions in other circuits are also inconsistent with the Seventh Circuit's approach in this case. The Eleventh Circuit described Rule 59(e) motions as applying "to motions for reconsideration of matters encompassed in a decision on the merits." *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir. 1984). The Ninth Circuit has held that alter or amend "means a substantive change of mind by the court." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983). The Third Circuit has held a fees motion not to be a motion to alter or amend because it "[did] 'not make any step toward final disposition of the merits of the case' and 'is not an ingredient of the cause of action.'" *West v. Keve*, 721 F.2d 91, 94-95 (3rd Cir. 1983).

Even the Seventh Circuit has, on at least one occasion, held a motion to vacate would not be a Rule 59(e) motion. In *Durkin v. Commissioner of Internal Revenue*, 872 F.2d 1271 (7th Cir. 1989), the tax court vacated a judgment to allow a concurrent appeal with another case. "[The Seventh Circuit] has held that a motion under

Rule 59(e) of the Federal Rules of Civil Procedure to 'alter or amend' a judgment which, as here, does not seek any substantive change in the judgment will not toll the period for appeal . . . ." *Id.* at 1274. Unlike the Seventh Circuit's mechanical approach, the cases in these circuits all analyze the underlying issues and determine whether those issues are wholly separate from the main cause of action. The Seventh Circuit has ignored this Court's decisions in *White*, *Buchanan* and *Osterneck*, as well as the decisions in the other circuit courts of appeals. *Compare Charles v. Daley*, *supra*, *and Harcon Barge Company v. D & G Boat Rentals, Inc.*, *supra*, *with Lucas v. Florida Power & Light Co.*, *supra*; *Miller v. Transamerican Press, Inc.*, *supra*; *West v. Keve*, *supra*.

The motion to vacate in this case did not call into question any of the underlying cause of action. The motion sought to raise issues of finality under 28 U.S.C. § 1291. It expressed concern that an appeal might oust the district court of jurisdiction to appoint a mediator and resolve issues raised in that process, a process ordered by the district court's June 21, 1991, judgment.

In this case the respondents were entitled to prescribed statutory relief. They received all the relief to which they were entitled in the court's June 21, 1991, judgment. This motion did not make any step toward final disposition. That had already been done, and respondents did not question its correctness.

The motion to vacate in this case raises legal issues collateral to the main cause of action and wholly separate from the decision on the merits. The district court was presented with a dispute between the respondent tribes and the State of Wisconsin over whether the State was required to negotiate certain games. The district court's holding entitled the respondents to statutory relief, an order requiring the State to conclude a compact within sixty days. The motion to vacate required the district

court to interpret 28 U.S.C. § 1291, not the Indian Gaming Regulatory Act. The tribe contended that, because of the possibility of the district court's involvement beyond the order to conclude a compact, the finality requirement of § 1291 was absent in the district court's judgment of June 21, 1991. These are legal issues collateral to the main cause of action. No issue involving 28 U.S.C. § 1291 arose until *after* the determination of the issues raised in the cause of action. The district court recites in the order denying the motion to vacate that all of the issues between the parties have been determined.

Respondent's motion in this case raised the issue of finality. "In the case at bar, there is much more that needs to be done beyond execution of the Court's judgment" (memorandum brief of respondent Lac du Flambeau in support of motion to vacate; A-39). There was no substantive change of mind by the court. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524. The court merely determined how § 1291 applied to its judgment. Nor did the court's holding on the motion to vacate make any step toward final disposition of the merits of the case "'[nor was it] . . . an ingredient of the cause of action.'" *West v. Keve*, 721 F.2d at 94-95. The issue raised was not "[a] reconsideration of matters encompassed in a decision on the merits." *Lucas v. Florida Power & Light Company*, 729 F.2d at 1301. It resolved issues wholly collateral to and separate from the decision on the merits.

II. THE POLICY CONSIDERATIONS ENUNCIATED IN *WHITE* COUNSEL THAT THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE SEVENTH CIRCUIT'S HOLDING THAT THIS MOTION TO VACATE WAS A RULE 59(E) MOTION.

In *White*, this Court considered the effect of holding a motion to be a motion under Rule 59(e) as it affected the important concerns of finality, judicial economy and fairness. An examination of these issues in this case indicates that a motion to vacate which questions whether a judgment is final promotes all of these important concerns.

Since the motion raises the issue of finality, a holding that a motion to vacate is a Rule 59(e) motion would not further the aim of determining finality. Neither the form nor the words used by the district judge determine whether a decision is final within the meaning of § 1291. *Curlott v. Campbell*, 598 F.2d 1175, 1178 (9th Cir. 1979). Likewise, the court of appeals must determine whether it has jurisdiction regardless of the district court's view on whether a particular decision is final. *Audi Vision Inc. v. RCA Manufacturing*, 136 F.2d 621 (2nd Cir. 1943). In view of these precedents, the district court's decision on whether a judgment is a final appealable order is of little consequence. If the district court believes that it is, it does not bind the court of appeals; and the court of appeals is bound to make its own separate determination of that fact. On the other hand, if the district court agrees and vacates the order as nonfinal, it does not create a nonappealable order.

A holding that this motion to vacate is a Rule 59(e) motion would likewise not serve the interest of fairness. The tribe was not the party aggrieved by the district

court's holding on summary judgment. Yet the tribe filed a motion which delays entry of judgment and lays a trap for the aggrieved party. While there are instances where the prevailing party will properly seek to alter or amend a judgment, the issue raised by the tribe's motion could and should have been presented to the court of appeals.

Furthermore, holding a motion to vacate on this ground to be a Rule 59(e) motion would not further judicial economy. The situation described in the preceding paragraph encourages counsel for the losing party to file multiple notices of appeal. By the same token, the decision of the district court is not binding on the court of appeals. In all likelihood, the court of appeals will reconsider, either on motion or *sua sponte*, the issue of whether the original order entered by the district court meets the requirements of § 1291. Holding a motion to vacate on grounds of nonfinality to be a Rule 59(e) motion would encourage both the district courts and the courts of appeals to determine the same issue. Prevailing parties who believe a judgment to be nonfinal can and should file a motion to dismiss in the court of appeals. Judicial economy counsels that determining finality in the court of appeals is the most expeditious and efficient way to resolve that issue. While nothing in the Federal Rules of Civil Procedure clearly divests the district court of power to determine the issue of finality, as a matter of policy this Court should encourage the issue to be determined there rather than in the district court. The district courts cannot bind the courts of appeals, and attempts to resolve the issue in district courts are inefficient and create uncertainty as to the time for appeal.

CONCLUSION

Because respondent Lac du Flambeau's motion to vacate was based on an interpretation of 28 U.S.C. § 1291, an issue wholly separate from and collateral to the main cause of action in the case, its motion to vacate was not a motion to alter or amend the judgment within the meaning of Fed. R. Civ. P. 59(e). The policy concerns of finality, judicial economy and fairness also counsel holding the motion to vacate in this case is not a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).

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Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

Table of Contents

Document	Page
DECISION, United States Court of Appeals for the 7th Circuit, dated March 23, 1992	A.1
JUDGMENT - WITH ORAL ARGUMENT, United States Court of Appeals for the 7th Circuit, dated March 23, 1992	A.6
ORDER, United States District Court for the Western District of Wisconsin, dated August 19, 1991	A.8
ORDER, United States District Court for the Western District of Wisconsin, dated July 22, 1991	A.10
NOTICE OF APPEAL, filed by attorneys for defendant State of Wisconsin, dated July 17, 1991	A.12
MEMORANDUM REPLY BRIEF OF PLAINTIFF LAC DU FLAMBEAU IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT, filed by attorneys for plaintiff Lac du Flambeau, dated July 12, 1991	A.15

LETTER BRIEF IN RESPONSE TO MOTION TO VACATE, filed by attorney for Sokaogon Chippewa Community, dated July 8, 1991 ..... A.23

DEFENDANTS' BRIEF IN OPPOSITION TO THE MOTION TO VACATE AND SET ASIDE THE JUDGMENT, filed by attorneys for defendant State of Wisconsin, dated July 8, 1991 ..... A.25

MEMORANDUM BRIEF OF PLAINTIFF LAC DU FLAMBEAU IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT, filed by attorneys for plaintiff Lac du Flambeau, dated June 26, 1991 ..... A.37

PLAINTIFF LAC DU FLAMBEAU'S MOTION TO VACATE AND SET ASIDE JUDGMENT, filed by attorneys for plaintiff Lac du Flambeau, dated June 26, 1991 ..... A.44

JUDGMENT IN A CIVIL CASE, United States District Court for the Western District of Wisconsin, dated June 21, 1991 ..... A.46

OPINION AND ORDER, United States District Court for the Western District of Wisconsin, dated June 18, 1991 ..... A.49

OPINION AND ORDER, United States District Court for the Western District of Wisconsin, dated July 18, 1990 ..... A.66

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-2698

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs-Appellees,

v.

STATE OF WISCONSIN, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 90-C-0408-C--**Barbara B. Crabb**, *Chief Judge*

ARGUED FEBRUARY 19, 1992--DECIDED March 23, 1992

Before EASTERBROOK and RIPPLE, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge*.

EASTERBROOK, *Circuit Judge*, Rule 4(a)(4) of the Federal Rules of Appellate Procedure is "the graveyard of an inordinate number of appeals." *Alerte v. McGinnis*, 898 F.2d 69, 70 (7th Cir. 1990). An appeal filed before the district judge disposes of a motion to alter or amend the judgment drops off the face of the planet. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

Unless the losing party files another after the district judge's action on the motion, it forfeits the opportunity for appellate review.

Sometimes it is hard to tell whether a given motion proposes to alter or amend the judgment, so that appeal is forbidden, or instead seeks a technical or collateral change, so that appeal is essential lest the time expire. *United States v. Ibarra*, 112 S. Ct. 4 (1991); *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989); *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988); *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986). Sometimes the proper characterization of the motion is simple, but counsel overlooks the effect of Rule 4(a)(4), or misunderstands the point that it is the docketing of the district judge's action, not the decision itself, that reactivates the right to appeal. So serious is the situation that the Advisory Committee on Appellate Rules has proposed to excise the offending part of Rule 4(a)(4), replacing it with a rule that an appeal filed before the disposition of a motion to amend the judgment shall be held in abeyance and spring into force when the judge acts. 137 F.R.D. 417, 437–46 (1991). Even if the Supreme Court promulgates the recommended language at its first opportunity, the change cannot occur before December 1, 1993. Until then Rule 4(a)(4) will continue to claim victims. The State of Wisconsin is the latest.

Two federally recognized bands of Chippewa Indians with reservations in Wisconsin filed this suit, seeking among other things a declaration that the Indian Gaming Regulatory Act, 25 U.S.C. §2710, requires the State to enter into compacts permitting them to operate slot machines and conduct casino games such as blackjack. The district court held that amendments to the state's constitution and recent legislation establishing a state lottery also authorize other forms of gambling, in which the tribes may engage. 770 F. Supp. 480 (W.D. Wis. 1991). On June 21, 1991, it entered a judgment requiring the State to negotiate for compacts with the tribes. Six days

later the Lac du Flambeau Band served and filed a motion asking the district court to vacate its judgment. According to the motion, entry of judgment is premature until the tribe has the compact with Wisconsin that is the principal objective of the suit. On July 17, after the parties had exchanged briefs on the tribe's motion, the defendants filed a notice of appeal. On July 22 the district judge denied the tribe's motion. Defendants did not file another notice of appeal.

Rule 4(a)(4) provides that a notice of appeal filed before the disposition of a timely motion under Fed. R. Civ. P. 59 to alter or amend the judgment "shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." The tribe's motion was timely, but was it one under Rule 59 to alter or amend the judgment? Wisconsin and the other defendants say no, for two reasons. The first is a throwaway: that the "motion" stated no reasons. Literally true; too, a motion giving no reasons has no effect. *Martinez v. Trainor*, 556 F.2d 818, 819–20 (7th Cir. 1977). But the two-sentence motion covered a six-page brief explaining the nature of the request and the reasons behind it. The second sentence of the motion reads: "The reasons in support of this motion are set forth in the tribe's accompanying memorandum brief." Often motions specify the relief sought while accompanying documents give explanation. Rules 4(a)(4) and 59 do not treat such companion filings as nullities. An empty motion cannot reserve time to file an explanation after the ten days allowed by Rule 59(b), see *Martinez*, but a brief contemporaneous with the motion fulfils the requirement of Fed. R. Civ. P. 7(b)(1) that motion papers "state with particularity the grounds" for the relief demanded.

Defendants' second contention is that the motion did not ask the court to "alter or amend" the judgment on the merits. Instead it asked the court to withdraw the

judgment. The tribe did not disagree with the court's legal analysis or its instruction to negotiate but believed that there should be no judgment. Motions seeking collateral relief such as costs or legal fees do not come within Rule 59, see *Buchanan*; a request to vacate the judgment likewise falls outside Rule 59, defendants submit. This argument misses the point of cases such as *Buchanan*. A judgment on the merits, say one specifying damages, is immediately enforceable; a dispute about costs does not affect any issue resolved by the judgment, so the appeal may proceed immediately. Substantive challenges to the judgment, by contrast, should be resolved before the case goes to the court of appeals. *Charles* adopts a bright-line rule: "all substantive motions served within 10 days of the entry of a judgment will be treated as based on Rule 59", no matter what nomenclature the movant employs. 799 F.2d at 347. (The tribe's motion did not identify a particular rule.) *Osterneck* concludes that although a motion raising matters "wholly collateral" to the judgment does not come under Rule 59, a request for prejudgment interest is a Rule 59 motion because it presents "matters encompassed within the merits of the underlying action." 489 U.S. at 176.

A motion to vacate the judgment in its entirety presents "matters encompassed within the merits of the underlying action." See *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984) ("vacation is a form of alteration"); *United States v. Gargano*, 826 F.2d 610, 611 (7th Cir. 1987). Until the court has resolved the motion, the subject (if any) to be presented on appeal cannot be known. The tribe made a simple point: it wants a compact with Wisconsin, leading it to submit that judgment directed exclusively to negotiation is premature. Had the court accepted this position, it would have annulled its judgment, leaving nothing from which the State could appeal. Any order issued at the end of negotiations would differ substantively from the judgment the court had entered. The court believed the tribe incorrect, observing

that an interlocutory injunction to dicker does not prevent subsequent supplemental relief, such as the appointment of a mediator under §2710(d)(7)(B) and review of the mediator's recommendation. Because an estimate of the merit of the motion does not affect its status in suspending the finality of the judgment, *Ibarra*, 112 S. Ct. at 6, the tribe's misunderstanding does not assist the State.

Much as we regret visiting the effects of counsel's error on the State of Wisconsin in a case bearing on its governmental powers, the current version of Rule 4(a)(4) leaves no alternative. A timely notice of appeal is essential to this court's jurisdiction. The notice defendants filed is ineffectual. The appeal is dismissed for want of jurisdiction.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001--Midwest Law Printing Co., Inc., Chicago--3-23-92

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 23, 1992

BEFORE: Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable KENNETH F. RIPPLE,
Circuit Judge

Honorable HARLINGTON WOOD, JR.,
Senior Circuit Judge

No. 91-2698

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs - Appellees

v.

STATE OF WISCONSIN, TOMMY G. THOMPSON, Governor of the State of Wisconsin, DONALD J. HANAWAY, Attorney General of the State of Wisconsin, et al.,

Defendants - Appellants

Appeal from the United States District Court for the Western District of Wisconsin
No. 90 C 408, Chief Judge Barbara B. Crabb

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that this appeal is DISMISSED for want of jurisdiction, with costs, in accordance with the decision of this Court entered this date.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

ORDER

v.

90-C-408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

The order entered herein on June 18, 1991 is AMENDED as follows:

In the 7th line from the bottom of page 3 the words "and (6)" are deleted.

In the 7th line from the bottom of page 21, the statutory citation is corrected to read, "§2710(d)(7)(B)(ii)."

In all other respects the order remains as entered.

Entered this 19th day of August, 1991.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Copy of this document has been
mailed to the following: Attys.
Greene, Rosenberg & Arts
this 19th day of Aug., 1991
By J. Dye
Secretary to Judge Crabb

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

ORDER

v.

90-C-408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

Plaintiff Lac du Flambeau Band of lake Superior Chippewa Indians has moved for vacation of the judgment entered herein on June 21, 1991, contending that entry of final judgment is premature. Plaintiff argues that this litigation will not be complete until a tribal-state compact has been concluded and that the court should retain jurisdiction because it may be necessary for the tribe to return to the court to seek the selection of a mediator under the provisions of 25 U.S.C. §2710(d)(7)(B)(iv).

I agree with plaintiff that it may be necessary for it or plaintiff Sokaogon Chippewa Community to come back to the court if the compact negotiations reach a stalemate. However, I disagree with plaintiff's characterization of this step as part of the litigation process. The merits of all of the claims raised by the parties have been decided; the

rights and liabilities of the parties have been determined; the only actions remaining are those that may be required to execute the judgment that has been entered. Under these circumstances, there is no reason to delay entry of judgment. Should it become necessary to appoint a mediator in order to conclude a compact, that is a ministerial task that requires no adjudication of legal issues. Because it is an aspect of execution of the judgment, the court retains jurisdiction to make the appointment even after final judgment has been entered.

ORDER

Plaintiff Lac du Flambeau's motion for vacation of the judgment entered herein on June 21, 1991 is DENIED.

Entered this 22nd day of July, 1991.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
Circuit Court Judge

Copy of this document has been
mailed to the following:
ALL COUNSEL
this 22nd day of July, 1991
By J. DYE
Secretary to Judge Crabb

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

v.

Civil Action No.
90-C-0408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney for Forest County, Wisconsin,

Defendants.

NOTICE OF APPEAL

The State of Wisconsin, Tommy G. Thompson, Governor of the State of Wisconsin; Donald J. Hanaway, Attorney General of the State of Wisconsin; David Vernon Penn, District Attorney of Vilas County, Wisconsin; and Janet L. Marvin, District of Attorney of Forest County, Wisconsin, defendants in the above-entitled action, by their counsel James E. Doyle, Attorney General, and Waltraud A. Arts and Warren D. Weinstein, Assistant Attorneys General, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the judgment of June 21, 1991, in its entirety. The defendants named herein appeal any and all portions of the opinions

and orders of June 18, 1991, and July 18, 1990, now merged in the judgment of June 21, 1991, interpreting adversely to them any provision of federal or state law and from any relief against them granted by the district court.

In the alternative, the above-named defendants appeal from the district court's June 18, 1991, opinion and order in its entirety,[1] and from any and all prior opinions and orders of the district court which are inextricably tied to the June 18, 1991, opinion and order.

Dated this 17th day of July, 1991.

JAMES E. DOYLE
Attorney General

/s/ Waltraud A. Arts
WALTRAUD A. ARTS
Assistant Attorney General

/s/ Warren D. Weinstein
WARREN D. WEINSTEIN
Assistant Attorney General

Attorneys for Defendants

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[1]At the time this Notice of Appeal is filed, there is a motion pending before the district court to vacate the judgment of June 21, 1991, on the ground that the court's opinion and order of June 18, 1991, is non-final. The defendants have opposed the motion to vacate and believe final judgment was properly entered on June 21, 1991. Since the motion to vacate does not stay the appeal time, the defendants are stating an alternate basis for immediate appeal should the district court grant the motion to vacate the judgment.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595
(608) 266-3683

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

vs.

Civil Action No. 90-C-0408-C

STATE OF WISCONSIN;
TOMMY G. THOMPSON, Governor of the State of Wisconsin;
DONALD J. HANAWAY, Attorney General of the State of Wisconsin;
DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and
JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

MEMORANDUM REPLY BRIEF OF PLAINTIFF LAC DU FLAMBEAU IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT

On July 8, 1991, defendants (hereinafter collectively referred to as "the state") filed their brief in opposition to plaintiff Lac du Flambeau Band of Lake Superior Chippewa Indians' (hereinafter "the tribe") motion to vacate and set aside the judgment entered by the clerk on June 21, 1991. This memorandum brief is submitted by the tribe in reply thereto.

ARGUMENT

1. The state argues there is nothing left to litigate in this case. Leaving aside the first and third claims for relief, over which there is no dispute, this assertion is incorrect with respect to the second claim for relief, which must be read in conjunction with the tribe's prayer for relief. The second claim raises the critical issue in the litigation -- namely, the proper scope of games which may be included within a class III compact. Clearly, the Court's June 18, 1991 Opinion and Order disposed of that issue. But the tribe did not raise that issue in a vacuum. Paragraph 2 of the prayer asked the Court to order the state to conclude a compact within sixty days and to appoint a mediator to resolve any impasse that may arise in the event a compact is not concluded within that time period.

The state has always viewed this litigation as a legal dispute over the proper scope of gaming within the meaning of 25 U.S.C. § 2710(d)(1)(B). But resolution of that dispute does not necessarily end the litigation within the context of final, appealable decisions. The tribe has consistently viewed this litigation as one concerning its right to obtain a compact, which will not be concluded until a compact is in place.

2. Notwithstanding the tribe's or the state's view of the litigation, the legal analysis must focus on the subject of final and appealable orders, which is particularly difficult here because that subject has not been addressed by any court within the context of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. The Supreme Court recognized the troublesome nature of this question when it said:

> And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either

> way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality.

Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964).

The state looks to Seventh Circuit decisions relating to suits seeking orders to arbitrate disputes between parties as the appropriate analogue to the case at bar. However, the tribe submits that a careful examination of those cases reveals that the state's reliance on them is misplaced.

3. University Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d 846 (7th Cir. 1983) concerned a suit in which University Life sought an order to compel arbitration. It obtained such an order, but in addition, the district court "retained jurisdiction of the case both to resolve any further disputes over arbitrability that might arise and to enforce any awards that might be made in the arbitration proceedings." Id. at 848-49. The circuit court held that the district court's order was final and appealable, notwithstanding the retention of continuing jurisdiction. In reaching that conclusion it relied on the law relating to permanent injunctions and reasoned that retention of continuing jurisdiction to enforce permanent injunctions does not destroy finality for purposes of appeal. The court stated:

> But when a permanent injunction is entered, the possibility that further issues may arise in the course of administering the injunction is not a sufficient reason to delay the appeal. Such issues may never arise; and if they do, it may not be for many years, by which time

> the issue of the validity of the injunction may be hopelessly stale.

Id. at 849 (emphasis added).

An examination of the above quote begins to reveal why the state's reliance on that case is misplaced. The issuance of an injunction and the award of an order compelling arbitration is, as a practical matter, far more "final" than the Court's order herein requiring the state to negotiate a compact within 60 days. In the former case, whether matters requiring the court's attention may arise in the future is unknown at the time the injunction issues. Furthermore, when those matters might arise is also unclear. They could arise within a few days of the issuance of the injunction -- or within a few years -- or not at all. Here, by contrast, issues that might arise will surface by approximately August 19, 1991, when the 60 day negotiating period expires. In contrast to University Life Insurance, supra, the "issue of the validity of the [Court's June 18th Opinion and Order will not] be hopelessly stale" if the state decides to appeal at that time, or shortly thereafter. Id.

4. A serious question concerns whether the analogue to arbitration cases is correct at all. In such suits, the only relief sought typically is an order requiring the parties to arbitrate. Indeed, that was the way in which the Seventh Circuit characterized University Life Insurance, supra, in the later case of Matter of Establishment Inspection of Skil Corp., 846 F.2d 1127, 1129 (7th Cir. 1988). Once again by contrast with the case at bar, the tribe seeks something more than an order to compel negotiations. It seeks a compact. In order to arrive at a compact, certain procedural steps must be taken, which could require further substantive decisions by the Court. The tribe already addressed the questions that could arise in connection with the appointment of a mediator in its opening brief. Additionally, other

substantive question could arise in connection with the reviewability of the mediator's choice of compact.[1]

5. In suits to compel arbitration, once a court decides whether the parties are entitled to it, the matter is referred to another forum for resolution.

> The order to arbitrate thrusts the defendant into a forum not of his choice, for what may prove to be protracted and costly proceedings; and the merits of the order are independent of what those proceedings might bring to light.

United Steelworkers v. Aurora Equip. Co., 830 F.2d 753 (7th Cir. 1987). Again, that is not the situation here. This case is not being referred to some other forum for resolution of the parties' dispute. And the merits of the Court's June 18th opinion are in no way independent of what is likely to transpire between the parties in the future in these proceedings, not in some other nonexistent forum. Here, the parties are directed to meet and conclude a compact within 60 days. However, if the compact is not concluded, they must return to the Court in these proceedings for the appointment of a mediator. This case is more like the situation where a court issues an "order of remand designed . . . to clarify the record before judicial review of the arbitration can proceed to final judgment," which was described in United Steelworkers v. Aurora Equipment Co., supra, at 754.

6. In the state's conclusion to its brief, it soundly chastises the tribe for its suggestion that a short delay in appeal, assuming the state were to file, would not result in

---

[1]The Sokaogon Chippewa Community submitted a letter brief on July 8, in which it raised the question of the reviewability of the mediator's choice of compact. The tribe believes it is premature to address that issue at this time, although it could arise in the very near future.

any undue harm. The state asserts, somewhat sanctimoniously, that such considerations are logically and legally irrelevant to the Court's consideration of the tribe's motion. However, the Supreme Court appears to disagree. It stated that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" Gillespie v. United States Steel Corp., supra, at 152-53 (citation omitted). Clearly, there is a risk in the case at bar associated with piecemeal appeals. And, the danger of denying the state justice due to a delay in its appeal if the tribe's motion is granted appears to be almost nonexistent.

7. The state implies that the Court's order is akin to an injunction, which of course is a final and appealable order. However, "[n]ot every order to do something is an injunction; with exceptions unnecessary to dwell on here since none would cover this order, a procedural order is not an injunction." United Steelworkers v. Aurora Equipment Co., supra, at 754. The tribe submits the Court's June 18th Opinion and Order was, at least with respect to the remedial portion, in the nature of a procedural order to the parties, which did not conclude the litigation.

For all these reasons, the tribe submits its motion to vacate and set aside the judgment should be granted.

Dated: July 12, 1991

Respectfully submitted,

Bruce R. Greene
GREENE, MEYER &
McELROY, P.C.
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Attorneys for Lac du Flambeau Band of Lake Superior Chippewa Indians

By: /s/ Bruce R. Greene
Bruce R. Greene

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of the foregoing Memorandum Reply Brief of Plaintiff Lac du Flambeau in Support of Motion to Vacate and Set Aside Judgment, via overnight carrier, all charges prepaid, on this 12th day of July, 1991, addressed to the following:

Warren D. Weinstein
Assistant Attorney General
Waltraud A. Arts
Assistant Attorney General
Wisconsin Dept. of Justice
123 W. Washington Avenue
Madison, Wisconsin 53703

Milton Rosenberg, Esq.
40 Glenway Street
Madison, Wisconsin 53707

/s/ Sarah M. Coe

July 8, 1991

Honorable Barbara Crabb
United States District Court
120 N. Henry Street
Madison, WI 53703

Re: Lac du Flambeau Band, et al. v. State of Wisconsin, et al.
Case No 90-C-408-C

Dear Judge Crabb,

This is to advise the Court of the Sokaogon Chippewas' position on the pending Motion to Vacate Judgment. In brief, while we do not believe that the possible need to resort to the district court for review of a mediator's decision in future need delay the entry of judgment at this juncture, we do not believe that such entry is appropriate if it were to preclude the issue of district court review in the future.

We do not agree that the appointment of a mediator is a further adjudicatory act preventing entry of a final judgment. On the other hand, movant does raise the issue of the reviewability of a mediator's decision which, if it does not require consideration at this juncture, should nevertheless not be foreclosed by the court.

IGRA provides that, in the case of a failure to conclude a compact within the allotted 60 day period, the district court is to appoint a mediator who shall choose between the parties' "last best offers."

IGRA provides standards for the exercise of the mediator's choice. These standards clearly imply reviewability of the decision, presumably on an abuse of discretion basis. In the case where a) the state submits a "last best offer" whose terms are clearly contrary to law and/or to the

court's decision and findings, b) the mediator chooses that offer and c) the state consents to the mediator's choice, IGRA appears clear on one score – the issue is not confided to the Secretary of Interior's prescription under 25 U.S.C. 2710(7)(B)(vii). That leaves IGRA subject to two interpretations: 1) Congress is presumed to have confided the tribe's post-adjudication rights to the arbitrary, unreviewable whim of a mediator; or 2) Congress intended the mediator's choice to be subject to some form of judicial superintendence by the district court.

Obviously, this plaintiff believes that the latter interpretation is the proper interpretation to be ascribed to Congress under IGRA.

We do not claim, however, that the possibility of judicial review on such hypthetical circumstances need necessarily prevent entry of a final judgment at this juncture. While we would object to the entry of a final judgment interpreted as precluding district court jurisdiction to review in the circumstances outlined, a judgment reserving such post-judgment issues, or the court's opinion that the entry of judgment would not preclude such post-judgment review in the circumstances described, would suffice for this plaintiff at this juncture.

Yours truly,

/s/ Milton Rosenberg

Milton Rosenberg
Attorney for the Sokaogon Chippewa

cc: Waltraud Arts, Esq.
Bruce R. Greene, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

v.

Civil Action No. 90-C-0408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney for Forest County, Wisconsin,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO THE MOTION TO VACATE AND SET ASIDE THE JUDGMENT

STATEMENT OF THE CASE

The plaintiff, Lac du Flambeau Band of Lake Superior Chippewa Indians (Lac du Flambeau) on June 27, 1991, filed a motion to vacate the final judgment entered on June 21, 1991. Lac du Flambeau claims that the court's opinion of June 18, 1991, denying the defendants' motion for summary judgment is interlocutory and, therefore, that judgment should not have been entered. The defendants believe the court's opinion and order of June 18 constitutes

a final order in this litigation and the court properly entered a final judgment on June 21.

ISSUE PRESENTED

I. Is this court's opinion of June 18 a final decision in this litigation so that the judgment of June 21, 1991, was properly entered as a final judgment?

ARGUMENT

I. THE COURT'S JUNE 18 OPINION IS A FINAL DECISION AND JUDGMENT WAS PROPERLY ENTERED ON JUNE 21, 1991.

A. A final decision is one which completely disposes of the matter on the merits so there is nothing left for the court to do except execute the judgment.

The test of finality for purposes of appeal focuses on whether the court has disposed of the whole case by adjudicating all rights and liabilities of the parties. Catlin v. United States, 324 U.S. 229, 233 (1945). The Seventh Circuit Court of Appeals has described a final order as one which ends the litigation on the merits leaving nothing further for the court to do except execute the judgment. Adams v. Lever Bros. Co., 874 F.2d 393, 394 (7th Cir. 1989), citing Catlin v. United States, 324 U.S. at 233. An order may be final even though it is not the last order possible to be made in a case. Gillespie v. United States Steel Corporation, 379 U.S. 148, 152 (1964).

All three claims in this action have been disposed of on the merits (Complaint, p. 8-9, paras. 33-41). The first claim challenged the State's actions during negotiations which took place in 1989 for lack of good faith, Title

25 U.S.C. § 2710 (d)(7)(A)(i) (1991). That claim was subsumed in the second claim by virtue of Lac du Flambeau's stipulation with the defendants (Stipulation of February 22, 1991). Lac du Flambeau agreed to proceed by summary judgment on its claim that the State had refused to negotiate, and agreed that the summary judgment made a trial on the first claim unnecessary. The Sokaogon Chippewa Community (Sokaogon) also agreed that no trial in the first claim was necessary when it informed the court on June 21, 1991, that it would file no objection to the court's order.[1] Therefore, there is nothing left to litigate on the first claim in the Complaint.

The second claim has also been disposed of on the merits. It alleged the State refused to bargain on certain games as required by federal law, Title 25 U.S.C. § 2710(d)(1)(B) (1991) (Complaint, p. 9, paras. 37-38). There is nothing left to litigate on this claim because this court's decision determined the plaintiffs are entitled to Class III gaming negotiations and that the defendants must negotiate on all Class III games. The rights and liabilities of the parties were fully determined by this court in accordance with its interpretation of the statutory provisions of the Indian Gaming Regulatory Act (IGRA), Title 25 U.S.C. § 2710(d)(1)(B)(i) (1991).

Likewise, the third claim has been disposed of on the merits. It dealt with state jurisdiction over criminal prosecutions of alleged violations of state gaming laws within Indian country (Complaint, p. 9, para 40). This court ruled on that claim in its July 1990 decision denying the plaintiffs' request for preliminary injunctive relief. Lac du Flambeau Band of Lk. Superior v. Wisconsin, 743 F.

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[1]The court's order of June 18, 1991, explicitly gave the Sokaogon seven days to object to the remedy ordered by the court (Decision and Order of June 18, 1991 at 21-22). The Sokaogon's letter to the court of June 21, 1991, declined any objection.

Supp. 645 (W.D. Wis. 1990).[2] Therefore, the third claim has also been finally determined by this court, leaving nothing left to litigate.

The analysis above demonstrates there is truly nothing left to be adjudicated by the court on any of the claims brought by the plaintiffs.[3]

B. The court's power to appoint a mediator does not alter the finality of the June 18, 1991, opinion and order.

The focus of the Lac du Flambeau's attack on the finality of the June 18 opinion is the authority of the district court to appoint a mediator should the parties fail to conclude a Tribal/State gaming compact within sixty (60)

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[2]This final determination is acknowledged in the court's Opinion and Order of June 18, 1991, at 9:

> Plaintiffs' motion for a preliminary injunction on the first claim [relating to state criminal jurisdiction] was denied in an opinion entered July 18, 1990. I held then that the class III activities the plaintiffs were offering on their reservations were illegal under federal law in the absence of a federal-state compact; that the state has no jurisdiction to prosecute violations of its gaming laws on the reservations; that such prosecutions are within the exclusive jurisdiction of the federal government . . . .

[3]This court's June 18, 1991, opinion and order, contrary to Lac du Flambeau's assertions, states that the only question before the court after the stipulation is the proper interpretation of the Indian Gaming Regulatory Act (Opinion and Order, June 18, 1991, at 10). In a footnote, the court also describes the Sokaogon's assertion that a further remedy could be afforded as "without foundation" (Id. at p. 10, n.2). Both these comments reveal this court's own view that its opinion and order are final.

days (Lac du Flambeau's memorandum brief at 3). Lac du Flambeau characterizes the possibility the court may appoint a mediator as an "additional remedial provision."

The defendants disagree with this characterization. The court's role in appointing the mediator is not adjudicatory but ministerial. The district court's remedial power under IGRA is described in Title 25 U.S.C. § 2710(d)(7)(B)(iii) (1991) in mandatory terms:

> If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.

If the sixty-day negotiation period does not yield agreement on a compact, the court is directed to appoint a mediator:

> If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best

> comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

Title 25 U.S.C. § 2710(d)(7)(B)(iv) (1991). The statute does not require the plaintiffs to make any adjudicatory showing in order to have the court appoint a mediator; the only criterion is failure of the parties to reach agreement within sixty days Title 25 U.S.C. § 2710(d)(7)(B)(iv) (1991). The appointment of the mediator under the statutory scheme is not an additional remedy, but is merely ancillary to the main issue determined by the court; the scope of games to be negotiated.[4]

Lac du Flambeau is incorrect in its assertion that the litigation will not be complete until a compact is concluded (Lac du Flambeau's memorandum brief at 4). The litigation is complete. The State's obligation to negotiate has been determined. The court's uncontested authority under IGRA to appoint a mediator if negotiations do not lead to agreement does not unsettle the finality of the court's ruling on the scope of negotiations.[5]

Even if, as Lac du Flambeau speculates, a hearing is required on appointment of a mediator, that hearing

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[4]The plaintiffs' prayer for relief (Complaint at 10, para. 2) does not characterize the appointment of a mediator as a separate or additional remedy but as part of the single remedy provided by Title 25 U.S.C. § 2710(d)(7)(B) (1991).

[5]The district court has no role in the negotiation of compacts under IGRA except to enforce the tribe's right to a compact or enforce the terms of a negotiated compact Title 25 U.S.C. § 2710(d)(7)(A) (1991). Even the mediator's role is limited to choosing one of the two last, best offers, Title 25 U.S.C. § 2710(d)(7)(B)(iv) (1991). The actual negotiations are conducted only between a State and a Tribe; neither the district court nor the mediator have a role in the course or conduct of negotiations, and neither has the authority to force a compromise by either a State or a Tribe.

would not adjudicate the right to appointment of a mediator which is predicated solely on the failure to reach agreement, but only on who will be appointed. This action by the court, i.e., determining who should be appointed, is part of the court's authority to execute its judgment.

Lac du Flambeau's speculative questions regarding events which may occur after the June 18 decision and order do not make the June 18 decision and order non-final. If a mediator is appointed and he/she selects a compact, the statute requires the mediator to go to the Secretary of the Department of the Interior, not to the district court, Title 25 U.S.C. § 2710(d)(7)(B)(vii) (1991). The Secretary then approves or disapproves the compact in accordance with the standards set forth in IGRA Title 25 U.S.C. § 2710(d)(8) (1991). No further role is provided for the district court after the appointment of a mediator.[6]

C. The June 18 decision and order completely disposes of the merits so there is nothing left to do but execute the judgment.

Lac du Flambeau correctly points out that entry of judgment under Rule 58, Fed. R. Civ. P., does not make an interlocutory order final.[7] However, since the June 18

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[6]IGRA does provide a role for the district court in enforcing approved Tribal-State compacts or in actions initiated by the Secretary of the Department of the Interior to enforce a compact prescribed by the secretary Title 25 U.S.C. § 2710(d)(7)(A) (1991). These provisions are not at issue here.

[7]The Seventh Circuit has opined that the separate document under Rule 58, Fed. R. Civ. P., starts the running of the time for appeal and provides the parties with notice of the appeal time. Exchange Nat. Bank of Chicago v. Daniels, 763 F.2d 286, 290 (7th Cir. 1985), reh'g granted, 768 F.2d 140 (7th Cir. 1985).

opinion and order meets the test of finality, the Rule 58, Fed. R. Civ. P. was properly entered on June 21.

IGRA provides a shift in forum regarding disputes between states and tribes over gaming compacts from the federal district court to the Secretary of the Department of the Interior once the statutory remedy has been granted by a court. Essentially IGRA defines the district court's role at this juncture as ordering bargaining. It is analogous to a situation where an action is brought to enforce an arbitration of disputes as was the case in University Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d 846 (7th Cir. 1983), reh'g denied. The court in that case held an order to arbitrate was appealable (i.e., final) even though the underlying dispute between the parties continued:

> If all the court had done was to order the parties to arbitrate, its order clearly would have been final, and therefore appealable under 28 U.S.C. § 1291. Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 782 (3d Cir. 1975); N.V. Maatschappij voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874, 875-76 (2d Cir. 1976). True, the order would not have resolved the underlying dispute between the parties but merely have decided who should resolve it. But it would have been final so far as the proceeding before the court, a proceeding to compel arbitration, was concerned, just as an order dismissing a complaint because the parties are in the wrong forum is final. And it should make no difference if in addition the court, as it did here, orders the parties to file with it a list of the issues to be arbitrated, so that there will be a judicial record of the scope of the order.

University Life Ins. Co. of America v. Unimarc Ltd., 699 F. 2d at 848. The order to conduct a sixty day negotiation is

akin to an order to arbitrate. While it does not resolve the regulatory framework for class III gaming in Indian country, it ends the proceeding before this court in that there is nothing left to adjudicate or litigate. No further judicial remedy is available since all the claims have now been resolved and the remedy has been granted to the plaintiffs. The possible appointment of a mediator is not a separate remedy, but a consequence of a disposition on the merits.[8]

An order may be final even if it ancillary to a proceeding in another forum. Matter of Establishment Inspection of Skil Corp., 846 F.2d 1127, 1129 (7th Cir. 1988). The court was considering the finality of an order granting a federal warrant to inspect documents at Skil Corporation which had been obtained by the Consumer Product Safety Commission. The fact that the dispute between the parties was continuing in another forum did not affect the appealability of the order, and the court rejected the notion that the likelihood of return to the district court later would affect appealability. Matter of Establishment Inspection of Skil Corp., 846 F.2d at 1129-30.[9]

In contrast to the two cases cited above, the court of appeals in United Steelworkers v. Aurora Equipment Co., 830 F.2d 753, 754 (7th Cir. 1987), held that a remand to an arbitrator for further proceedings is not a final order. It

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[8]The court in University Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d at 849, commented that such an order may also be appealable under 28 U.S.C. § 1292(a)(1) as an injunction. However, the case held the order to arbitrate was final under 28 U.S.C. § 1291.

[9]The court ultimately likened the inspection warrant to an injunction and found it appealable under 28 U.S.C. § 1292(a)(1). Matter of Establishment Inspection of Skil Corp., 846 F.2d at 1130. However, the opinion's reasoning regarding finality is based on 28 U.S.C. § 1291. Id. at 1129-30.

distinguished an order to arbitrate, where that was the remedy sought from the district court, from a remand to an arbitrator:

> But we think it possible to distinguish between an order to arbitrate and a remand to the arbitrator, having due regard for the advisability of minimizing appeals that disrupt and delay arbitrations. The order to arbitrate thrusts the defendant into a forum not of his choice, for what may prove to be protracted and costly proceedings; and the merits of the order are independent of what those proceedings might bring to light. Such an order is different from an order of remand designed (as in this case) to clarify the record before judicial review of the arbitration can proceed to final judgment.

United Steelworkers v. Aurora Equipment Co., 830 F.2d at 754.

The order to negotiate within sixty days in analogous to an order to arbitrate placing the parties in a new forum, and the possibility of appointment of a mediator does not change this character. There is no contemplation that this court will create a further reviewable record in this case. The merits of the court's decision ordering negotiation is entirely separable from what may result during the negotiations. It would be placing undue formal emphasis on the dual nature of the remedy (first negotiation then mediation) to hold that the current order is interlocutory.

CONCLUSION

This court properly entered judgment on June 21, 1991, since the court has now fully litigated all the claims

before it in this case and has ordered the only remedy available to the plaintiffs. There is nothing left for this court to do except supervise the remedy it has granted and appoint a mediator if one is required. No further litigation is contemplated that would change the court's rulings or alter the remedy. Under the tests of finality which govern 28 U.S.C. § 1291, the court's decision of June 18, 1991, is final.

Since the decision is final, the defendants are entitled to appeal within the time set by law.[10] Lac du Flambeau suggests that a delay in appeal will not prejudice the defendants.[11] Such a consideration is logically and legally irrelevant to this court's decision on the motion to vacate. Either the June 18 decision is final in substance or not. Strategic consideration regarding timing of an appeal have no place in the argument and are, at best, speculative.

The defendants ask the court to affirm the finality of its decision and to deny Lac du Flambeau's attempt to vacate the judgment.

JAMES E. DOYLE
Attorney General

/s/ Waltraud A. Arts

WALTRAUD A. ARTS
Assistant Attorney General

Attorneys for Defendants

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[10]No decision regarding appeal has been made by the defendants at this time.

[11]Lac du Flambeau Memorandum Brief at p. 6, para. 8.

Wisconsin Department of Justice
Post Office Box 7857
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July 8, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

vs.

Civil Action No. 90-C-0408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

MEMORANDUM BRIEF OF PLAINTIFF LAC DU FLAMBEAU IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT

INTRODUCTION

On June 18, 1991, the Court entered its Opinion and Order in the above captioned matter, which resolved a critical and fundamental legal dispute between the parties over the proper interpretation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., (hereinafter "the IGRA" or "the Act"). On June 21, 1991, the Clerk of the Court entered judgment, pursuant to Rule

58, Fed. R. Civ. P., which purports to conclude this matter. (hereinafter "the tribe") believes the Court's June 18th Opinion and Order was interlocutory in nature and that entry of judgment was premature and therefore, has filed a motion to vacate and set the judgment aside. This memorandum brief is submitted in support of the tribe's motion.

ARGUMENT

1. The tribe's complaint in this matter alleged the Court has jurisdiction pursuant to 28 U.S.C. § 1362 and 25 U.S.C. § 2710(d)(7)(A)(i). Three claims for relief were stated. The first claim stated that defendants (hereinafter collectively referred to as "the state") had failed to negotiate in good faith to conclude a tribal/state compact under the IGRA. The second claim stated that the now reversed Hanaway opinion[1] was incorrect and contrary to the IGRA; and that casino style gaming is permitted for any purpose by any person within the meaning of the Act. The third claim stated that the criminal laws of the state relating to gambling did not apply on the reservation.

2. The tribe's prayer for relief sought, inter alia, a declaration that the state failed to negotiate in good faith, an order requiring the state to negotiate and conclude a compact within a sixty day period after entry of the Court's order, and the appointment of a mediator in the event a compact was not concluded during that period.

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[1]90 Wis. Op. Att'y Gen. 3 (1990). Attorney General Doyle's opinion reversing Hanaway's earlier opinion was issued May 2, 1991. 91 Wis. Op. Att'y Gen. 10 (1991).

3. On June 18, 1991, the Court issued its Opinion and Order in response to the state's motion for summary judgment. The Court summarized the dispute, as follows:

> The parties dispute whether the state is required to include casino games, video games and slot machines in its negotiations with the tribes. I conclude that it is required to negotiate those activities because they are permitted under Wisconsin law within the meaning of 25 U.S.C. § 2710(d)(1)(B). Accordingly, I will deny defendants' motion for summary judgment.

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, Slip Op. and Order, 4. In the Court's Order, at p. 21 of the slip Opinion and Order, it required the state to conclude a tribal/state class III gaming compact within sixty days after June 18, 1991.

4. If the state and the tribe are unable to conclude a compact within the sixty day period ordered by the Court, there are additional remedial provisions under the Act which will govern the parties. These provisions, found at 25 U.S.C. § 2710(d)(7)(B)(iv)–(vii), include the appointment by the Court of a mediator to whom the state and the tribe will submit their last best offer of compact. Thereafter, the mediator will select a compact, which would govern the parties assuming the state consents to its selection. The mediator is obligated to select that compact "which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court." 25 U.S.C. § 2710(d)(7)(B)(iv).

5. The entry of judgment at this time is premature for at least two reasons. First, the tribe, through this litigation, has sought the conclusion of a tribal/state compact. The litigation will not be completed until a compact is concluded. The Court's ruling on the state's motion for summary judgment disposed of a critical legal

dispute between the parties, which should facilitate the conclusion of a compact. However, the Court's ruling does not end the case. Rather, the ruling paves the way for a compact between the parties, but until a compact is in place the case is not over.

6. The second reason for entry of judgment was premature is because the Court's powers may need to be invoked in order to select a mediator. The Act provides little guidance regarding what type of person might be an appropriate mediator and how that person would be compensated for his or her time. If the parties are unable to agree about these issues, a hearing, which could include testimony of the proposed mediators preferred by each party, might be required. If the state files a notice of appeal regarding the Court's June 18th Opinion and Order, it is possible this Court may be deemed to lack jurisdiction to dispose of these issues. Of course, the appointment of a mediator is not the only issue that might require the Court's attention. For example, suppose a court appointed mediator selects a compact which either party contends does not "best comport with the terms of this Act. . . . " § 2710(d)(7)(B)(iv). May either party raise that issue before the Court? The answer to that question is unclear. However, the Court should not be deprived of the opportunity to consider the question in the event either party chooses to raise it. An appeal, if taken by the state, arguably ousts the Court of jurisdiction.

7. Although Rule 58 provides for the entry of judgments, it does not address the question of whether a judgment is final for purposes of appeal.

> Rule 58 only states how a judgment is entered. "It does not speak to whether a judgment . . . is a 'final judgment' for purposes of an appeal." 11 C. Wright & A.

Miller, Federal Practice & Procedure § 2785, at 17 (1973).

Aleut Tribe v. United States, 702 F.2d 1015, 1019 (Fed. Cir. 1983). Reading the Court's Opinion and Order together with the remedial provisions of the IGRA, it is difficult to conclude that the instant litigation is now over. Foremost Sales Prom. v. Director, Bur. of Alcohol, Tobacco and Firearms, 812 F.2d 1044, 1045 (7th Cir. 1987), rev'd in part after clarification on other grounds, 860 F.2d 229, 232 n.2 (7th Cir. 1988) ("It is not possible to tell from the opinion whether the judge viewed this as the end of the case.") See also, Alloyd Gen. Corp. v. Building Leasing Corp., 361 F.2d 359, 362 (1st Cir. 1966) ("Contrary to defendant's contention, the order does not clearly evidence the district court's intention that it shall be its final act in the case which is one of the tests laid down in United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 233 (1958)). Generally, a decision is final for purposes of 28 U.S.C. § 1291 if there is nothing left to be done but execution of the court's judgment. Smith-Bey v. Hospital Adm'r, 841 F.2d 751, 755 (7th Cir. 1988). In the case at bar, there is much more that needs to be done beyond execution of the Court's judgment.

8. For all these reasons, the tribe submits the entry of judgment by the clerk was premature and, therefore, should be vacated. The tribe suggests there is no harm to the state of which it is aware, in the event the tribe's motion to vacate is granted. Thus, the tribe is hard pressed to understand why the delay of the entry of judgment for a few months harms the state. In any event, if the state determines to file an appeal and believes it must be accomplished immediately, it is free to pursue an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). If it chooses that course, it can advise the Court and the tribe through its motion why "an immediate appeal from the [Court's Opinion and] order may materially advance the ultimate termination of the litigation. . . . " Id.

Dated: June 26, 1991

Respectfully submitted,

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By: /s/ Bruce R. Greene
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of the foregoing Plaintiff Lac du Flambeau's Motion to Vacate and Set Aside Judgment and Memorandum Brief of Plaintiff Lac du Flambeau in Support of Motion to Vacate and Set Aside Judgment, via overnight carrier, all charges prepaid, on this 26th day of June, 1991, addressed to the following:

Warren D. Weinstein
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Assistant Attorney General
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Milton Rosenberg, Esq.
40 Glenway Street
Madison, Wisconsin 53707

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

vs. Civil Action No. 90-C-0408-C

STATE OF WISCONSIN;
TOMMY G. THOMPSON, Governor of the State of Wisconsin;
DONALD J. HANAWAY, Attorney General of the State of Wisconsin;
DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and
JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

PLAINTIFF LAC DU FLAMBEAU'S MOTION TO VACATE AND SET ASIDE JUDGMENT

Plaintiff Lac du Flambeau Band of Lake Superior Chippewa Indians (hereinafter "the tribe") hereby moves the Court to vacate and set aside its judgment in the above captioned case, which was entered by the Clerk pursuant to Rule 58, Fed. R. Civ. P. on June 21, 1991. The reasons

in support of this motion are set forth in the tribe's accompanying memorandum brief.

Dated: June 26, 1991

Respectfully submitted,

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(SEAL OF CLERK)
U.S. DISTRICT COURT
WEST. DIST. OF WIS.

JUN 21 1991

Filed/Received
Joseph W. Skupniewitz

JUDGMENT IN A CIVIL CASE

United States District Court — West. Dist. of Wis.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR INDIANS, ET AL.

Plaintiffs,

v.

STATE OF WISCONSIN, ET AL,

Defendants.

Docket Number
90-C-0408-C

Name of Judge or Magistrate
Judge Barbara B. Crabb

___ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action has come on for consideration by the Court with the judge ~~(magistrate)~~ named above presiding. The issues

have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendants' motion to strike the affidavits of Rita Keshena, Milton Rosenberg and James Landru is GRANTED and defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to 25 U.S.C. §2710(d)(6)(B)(ii) the State of Wisconsin is REQUIRED to conclude a tribal-state class III gaming compact with plaintiff Lac du Flambeau Band of Lake Superior Chippewa Indians and with plaintiff Sokaogon Chippewa Community gaming compact within sixty (60) days from the date of the order dated June 18, 1991.

APPROVED AS TO FORM:

This 21st day of June, 1991

/s/ Barbara B. Crabb
BARBARA B. CRABB
U.S. District Judge

Clerk
/s/ Joseph W. Skupniewitz

Date
JUN 21 1991

(By) Deputy Clerk

Copy of this document has been provided to: Greene, Kanenberg & Arts this 21 day of June, 1991.

By /s/ S. Hahn
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

v.

OPINION and ORDER

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

90-C-408-C

Defendants.

This is a civil action brought under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., arising out of defendants' alleged failure to bargain in good faith with plaintiffs on the terms of a tribal-state Indian gaming compact. Defendants concede that the state has refused to bargain over certain gaming activities that it believes are not proper subjects of negotiation. They represent, however, that the state is prepared to return to negotiations once the court has determined whether the disputed activities are proper subjects for a compact.

The case is before the court on defendants' motion for summary judgment, and their motions to strike the affidavits of Rita Keshena, Milton Rosenberg and James Landru. Jurisdiction is present. 25 U.S.C. §2710(d)(7)(A).

The Indian Gaming Regulatory Act is the product of years of legislative effort to devise a comprehensive scheme for regulating gaming activities on Indian lands. It reflects congressional concerns about the increasing reliance of Indian tribes on gaming revenues for the provision of governmental services to tribal communities and the lack of mechanisms for regulating gaming activity. The essential feature of the Act is the tribal-state compact process, the means Congress devised to balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty. The structure of the Act conforms to the basic principle that the states and tribes negotiate as sovereigns. See S. Rep. No. 100-446, 100th Cong., 2d Sess. at 13:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.

The Act divides gaming activities into three classes. Class I includes social games played solely for prizes of

minimal value and traditional forms of Indian gaming engaged in as part of a tribal celebration or ceremony. 25 U.S.C. §2703(6). These activities are within the exclusive jurisdiction of the tribe. §2710(a)(1). Class II games include bingo and related games and non-banking card games, as well as certain "grandfathered" card games that were operated by Indian tribes in four named states before May 1, 1988. §2703(7). Specifically excepted from Class II are non-grandfathered banking games such as baccarat, chemin de fer or blackjack, and video games of chance and slot machines. Class II gaming is within the jurisdiction of the tribes, subject to the requirements of the Act, with some oversight by the National Indian Gaming Commission. §2710(a)(2) and (6).

Class III includes all other forms of gaming. 25 U.S.C. §2703(8). Class III gaming activities are lawful on Indian lands only if the activities are (1) authorized by an ordinance or resolution adopted by the governing body of the tribe that meets the requirements of the statute and is approved by the commission chairman; (2) located in a state that permits such gaming for any purpose by any person, organization or entity; and (3) conducted in conformance with a tribal-state compact entered into by the tribe and the state. §2710(d).

The parties dispute whether the state is required to include casino games, video games and slot machines in its negotiations with the tribes.[1] I conclude that it is required to negotiate those activities because they are permitted under Wisconsin law within the meaning of 25 U.S.C. §2710(d)(1)(B). Accordingly, I will deny defendants' motion for summary judgment.

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[1] In this opinion, the term "casino game" refers to banking card games played against the house, such as baccarat, chemin de fer and blackjack, and to roulette, poker and craps. The term "video games" is used as shorthand for electronic or electromechanical facsimiles of any game of chance. See 25 U.S.C. §2703(7)(B)(ii).

For the purpose only of deciding defendants' motion for summary judgment, I find that there is no genuine issue with respect to any of the following material facts set forth under the heading "Facts." In making these findings, I have not taken into consideration any of the averments included in the affidavits of Rita Keshena, Milton Rosenberg or James Landru, because those averments relate to the manner in which the state has negotiated with the tribes or to the state negotiators' understanding of the scope of the negotiations for a tribal-state compact and have no bearing on the issue raised on the motion for partial summary judgment, which is whether the gaming activities at issue are lawful under 25 U.S.C. §2710(d). It is irrelevant whether the state bargained in good faith because it concedes it has not bargained on the disputed activities and is prepared to conclude a compact once it has been determined which activities must be included in the negotiations. It is irrelevant also what the negotiators thought the statute requires; the requirements of the statute raise an issue of law and not of fact.

FACTS

Plaintiffs Lac du Flambeau Tribe of Lake Superior Chippewa Indians and Sokaogon Chippewa Community are federally-acknowledged Indian tribes with reservations in the State of Wisconsin. Defendant State of Wisconsin is a sovereign state of the United States. Defendant Tommy G. Thompson is Governor of the State of Wisconsin. Defendant David Penn is the District Attorney for Vilas County, Wisconsin. At all times relevant to this suit, defendant Donald J. Hanaway was the Attorney General of the State of Wisconsin, and defendant Janet Marvin was the District Attorney for Forest County, Wisconsin.

The Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., became effective October 17, 1988. On November 16, 1988, plaintiff Lac du Flambeau submitted a written request for tribal-state compact negotiations. Although

plaintiff Sokaogon never submitted a written request, it was a party to the various efforts at negotiation that were carried out with the plaintiff tribes as well as with other Wisconsin tribes.

On July 19, 1989, plaintiff Lac du Flambeau proposed as class III gaming activities the following games: "Black Jack 21 - cards, Cards, Video/Slots, games such as Black-Jack and Poker, Craps, Roulette, Keno, off track betting parlor, Sports book." On October 18, 1989, the Department of Justice's tribal-state gaming compact negotiator sent plaintiff Lac du Flambeau a final draft of the tribal-state gaming compact between it and the State of Wisconsin.

On November 14, 1989, Michael Allen, plaintiff Lac du Flambeau's tribal president, resubmitted a gaming compact to the State of Wisconsin based on tribal council action of November 13, 1989. The resubmitted compact covered casino games, including video gaming machines, roulette, slot machines, poker and craps.

The final draft gaming compact with plaintiff Sokaogon covered casino games, including video gaming machines, blackjack, roulette, slot machines, poker and craps.

When bill drafts of the tribal-state gaming compacts were requested, legislative lawyers raised questions about the scope of the games that had been negotiated, particularly about the inclusion of activities not conducted by anyone else in Wisconsin. On October 24, 1989, the Wisconsin Lottery Board requested an attorney general's opinion on the scope of gaming permitted in Wisconsin. On February 5, 1990, defendant Hanaway issued an opinion to the effect that class III games were prohibited in Wisconsin with the exception of lotteries and on-track parimutuel wagering. Since then, the State of Wisconsin has refused to negotiate on any class III activities other than lotteries and on-track betting.

At the present time, the Wisconsin Lottery conducts three types of lotteries in which prizes are distributed among persons who purchase tickets: instant scratch games, pull-tab or break-open games, and on-line games. Instant scratch games are lotteries that use preprinted tickets with a latex covering that is scratched off to reveal the play symbols underneath. A player wins when a winning combination of play symbols is printed on the ticket. The lottery also offers additional methods of play such as secondary drawings for persons who hold winning instant scratch tickets.

Pull-tab or break-open games utilize preprinted tickets made of laminated paper that is partially perforated to allow a strip to be torn to reveal the symbols underneath. As in instant scratch games, the player wins if there is a winning combination of symbols on the ticket.

In on-line games, the player chooses (or the computer selects) a subset of six numbers from a larger set of numbers. The winning numbers are determined by a drawing, and prizes are paid for matching, in any order, six, five or four of the numbers drawn. Tickets are issued by a computer terminal connected electronically to a central computer that records and confirms the play. The ticket is the evidence of the player's entry numbers and is the only basis on which a prize may be claimed. Wisconsin's MEGABUCKS, Lotto*America, is an on-line game in which the player chooses (or the computer selects) six different numbers between 1 and 54, and prizes are awarded for matching four, five or six of the numbers drawn. It is offered simultaneously by sixteen governmental jurisdictions within the United States through a commonly administered drawing and prize pool. SuperCash is an on-line game with a set top prize of $250,000 for matching correctly, in any order, six, five of four of the numbers drawn. A third type of on-line game adds a secondary method of playing an on-line game. For example, a person may win a small cash prize if he or she

happens to be the 99th person to purchase a ticket, as determined by the central computer.

The Wisconsin Racing Board is an agency of the State of Wisconsin. It regulates racing and on-track parimutuel wagering in the state, and issues licenses to applicants who wish to own and operate racetracks at which on-track parimutuel wagering is conducted. It has licensed five dog racetracks since it began operating.

OPINION

Plaintiffs' complaint states two causes of action: a claim pursuant to 28 U.S.C. §1362 to enjoin defendants Penn and Marvin from prosecuting the plaintiffs for operating certain gaming activities on their reservations, and the claim at issue, that the state failed to bargain with plaintiffs in good faith within the meaning of the Indian Gaming Regulatory Act. Plaintiffs' motion for a preliminary injunction on the first claim was denied in an opinion entered July 18, 1990. I held then that the class III activities the plaintiffs were offering on their reservations were illegal under federal law in the absence of a federal-state compact; that the state has no jurisdiction to prosecute violations of its gaming laws on the reservations; that such prosecutions are within the exclusive jurisdiction of the federal government; and that plaintiffs could show no irreparable harm from the threat of unlawful state prosecution because they could avert such harm simply by ceasing their illegal gaming activity. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F.Supp. 645 (W.D.Wis. 1990). None of those holdings is implicated in the present motion, which relates only to the interpretation of §2710(d)(1) of the Indian Gaming Regulatory Act.

Defendants concede that the state's refusal to bargain casino games, video games and slot machines subjects it to an order from the court requiring it to reach

a compact with the plaintiffs within sixty days. Defendants have stipulated with plaintiff Lac du Flambeau that once their motion for summary judgment is decided, an order can issue giving the state sixty days in which to reach a compact with the Lac du Flambeau. This concession and stipulation make it unnecessary to hold a trial or evidentiary hearing to determine whether the state has negotiated in good faith with plaintiff Lac du Flambeau, and leave the only question before the court the proper interpretation of the Indian Gaming Regulatory Act.[2]

The issue between the parties centers on the provision in 25 U.S.C. §2710(d)(1) that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ." (Emphasis added.) Defendants argue that casino games, video games and slot machines are not permitted for any purpose by any person, organization or entity within Wisconsin; because they are not, the state is not required to bargain over these games. Defendants' position is that Congress meant "permits" to be given its usual dictionary meaning of formally or expressly granting leave; therefore, unless a state grants leave expressly for the playing of a particular type of gaming activity within

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[2] Plaintiff Sokaogon has refused to enter into a similar stipulation, wishing to preserve its right to demonstrate the state's lack of good faith in negotiation. Given the state's concession that it has failed to negotiate over any Class III activities, including those that are clearly subject to negotiation because they are in operation in Wisconsin, it is difficult to understand what advantage plaintiff Sokaogon thinks it is gaining by refusing to stipulate. It can gain no remedy other than the one the state has conceded even if it shows that the state has demonstrated other indicia of bad faith in its negotiations. Plaintiff suggests that findings of bad faith by the court would have a material effect on the mediator's choice of last, best offer should the negotiations reach an impasse, but this suggestion is without foundation.

the state, that activity cannot be lawful on Indian lands. Under this approach, the state is required to bargain only over gaming activities that are operating legally within the state.

Defendants' reading of "permits" ignores the other meanings assigned to the word, such as "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act." Black's Law Dictionary (5th ed.). More important, it ignores the Supreme Court's opinion in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), on which Congress relied in drafting the Indian Regulatory Gaming Act. In Cabazon, the Supreme Court held that in determining whether a state's criminal laws would apply to gambling on Indian lands under Public Law 83-280, a court must analyze the state's policy toward gambling.[3] If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation. California's policy was found to be regulatory: the state permitted and even promoted many forms of gambling, including a state-run lottery, parimutuel racing, bingo, and the card games played in the tribal card room. Because California regulated rather than prohibited

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[3] Pub. L. No. 83-280, which was enacted in 1953 and codified as 18 U.S.C. §1162 and 28 U.S.C. §1360, gave six states, including Wisconsin, limited civil and general criminal jurisdiction in certain areas of Indian country within their borders. As a result, Wisconsin has criminal jurisdiction over offenses committed by or against Indians in all Indian country within the state, with the exception of the Menominee Reservation, "to the same extent that [it] has jurisdiction over offenses committed elsewhere within the State . . . ." 18 U.S.C. §1162(a).

gambling in general and bingo in particular, id. at 211, it could not enforce its criminal gambling laws against the Cabazon band's high-stakes bingo and card games without infringing impermissibly on tribal sovereignty. Id. at 222.

The Senate Report on the Indian Gaming Regulatory Act makes explicit reference to Cabazon in discussing class II gaming, which has the same requirement as class III gaming that the gaming activity be "located within a state that permits such gaming for any purpose by any person, organization or entity." §2710(b)(a)(A). The Senate committee stated that it anticipated that the federal courts would rely on the Cabazon distinction between regulatory gaming schemes and prohibitory laws, explaining with regard to the scope of allowable activities:

> The Committee wishes to make clear that, under S.555 [the gaming act], application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.

S. Rep. No. 100-446 at 6. Under Pub. L. 280, a court looks at the civil-criminal distinction to determine whether a state can go onto an Indian reservation to enforce the state's criminal gambling laws; under the Indian Gaming Regulatory Act, the court looks at the distinction between the state's civil and criminal laws to determine whether the state permits gaming activities of the type at issue.

Although the Senate committee was speaking of class II activities, its comments are equally applicable to the requirement for class III activities. 25 U.S.C.

§2710(d)(1)(B). See Mashantucket Pequot Tribe v. Connecticut, 913 F. 2d 1024, 1020, (2d Cir. 1990), cert. denied, 111 S.Ct. 668 (1991): "We deem this legislative history [relating to class II gaming] instructive with respect to the meaning of the identical language in section 2710(d)(1)(B), regarding class III gaming, which we must interpret." See also United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), cert. denied, 436 U.S. 930 (1978) (settled principle of statutory construction that same word or phrase used in more than one section of statute will be construed to have same meaning in next place if its meaning in the first place is clear).

In addition, the congressional findings set out at subsection (5) of 25 U.S.C. §2701 support the view that Congress did not intend the term "permits such gaming" to limit the tribes to the specific types of gaming activity actually in operation in a state.

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [Emphasis added.]

In light of the legislative history and the congressional findings, I conclude that the initial question in determining whether Wisconsin "permits" the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory.

The original Wisconsin Constitution provided that "[e]xcept as provided in this section, the legislature shall never authorize any lottery, or grant any divorce." For more than a century, this prohibition against "any lottery" was interpreted as prohibiting the operation or playing of

any game, scheme or plan involving the elements of prize, chance and consideration. The prohibition against a "lottery" has been held to outlaw theater promotions, State ex rel. Cowie v. La Crosse Theaters Co., 232 Wis. 153, 286 N.W. 707 (1939); mercantile promotions, State ex rel. Regez v. Blumer, 236 Wis. 129, 294 N.W. 491 (1940); charitable bingo, State ex rel. Trampe v. Multerer, 234 Wis. 50, 289 N.W. 600 (1940); and television games of chance, State v. Laven, 270 Wis. 524, 71 N.W.2d 287 (1955). In 1965, however, the constitution was amended to allow Wisconsin citizens to participate in promotional sweepstakes (by defining "consideration" as not including listening to or watching a radio or television program or visiting a store or other place without being required to make a purchase or pay a fee). The constitution was amended again in 1973 to authorize bingo when played by charitable organizations, and in 1977 to allow raffles for charitable organizations. In 1987 the electorate approved two constitutional amendments: one authorized the state to operate a lottery, with the proceeds going to property tax relief, Wis. Const. Art. 4, §24(6); the second removed any prohibition on parimutuel on-track betting. Art. 4, §24(5).

When the voters authorized a state-operated "lottery," they removed any remaining constitutional prohibition against state operated games, schemes or plans involving prize, chance and consideration, with minor exceptions. See Op. Att'y Gen. Wis. 10-91, slip op. at 5 ("Under the [state] constitution, the Legislature may authorize any type of state-operated lottery subject only to the advertising, use-of-revenue and off-track wagering restrictions.")[4]

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[4] This conclusion departs from the conclusion of defendant Hanaway, former Attorney General, expressed in Op. Att'y Gen. Wis. 3-90. Defendant Hanaway found that the framers of the state constitution and the members of the legislature considered lotteries a form of gambling separate and distinct from other forms of gambling such as betting, playing gambling machines, etc.

The amendments to the Wisconsin Constitution evidence a state policy toward gaming that is now regulatory rather than prohibitory in nature. See Cabazon, 480 U.S. at 211: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." The fact that Wisconsin continues to prohibit commercial gambling and unlicensed gaming activities does not make its policy prohibitory. See Cabazon, 480 U.S. at 211, rejecting a similar argument by the State of California, which asserted that it could prohibit high stakes, unregulated bingo on the reservation because it treated such bingo as a misdemeanor under state law: "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." See also Mashantucket Pequot Tribe, 913 F.2d at 1029 (state's allowance of state-operated lottery, bingo, jai alai and other forms of parimutuel betting evidence a regulatory rather than prohibitory policy toward class III gaming although state outlawed the casino games at issue except for fund-raising purposes by nonprofit organizations under certain highly regulated circumstances); United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 367 (8th Cir. 1990) (existence of state-regulated blackjack, bingo, parimutuel horse and dog race betting, state lottery, and slot machines shows South Dakota's gaming policy to be non-prohibitory, although state had outlawed card games played for money until institution of this action).

Defendants argue that even if Wisconsin is viewed as having a regulatory policy toward class III gaming activities in general, the state need not negotiate the specific activities in dispute because it does not permit expressly the type of gaming plaintiffs want to offer on their reservations. It is not necessary for plaintiffs to show that the state formally authorizes the same activities

plaintiffs wish to offer. The inquiry is whether Wisconsin prohibits those particular gaming activities. It does not.

Defendants' assertion that they are required to negotiate only the identical types of games currently offered by the lottery board misconceives the point of the Indian Gaming Regulatory Act, as well as the holding in Cabazon. It was not Congress's intent that the states would be able to impose their gaming regulatory schemes on the tribes. The Act's drafters intended to leave it to the sovereign state and tribal governments to negotiate the specific gaming activities involving prize, chance and consideration that each tribe will offer under the terms of its tribal-state compact. See Mashantucket Pequot Tribe, 913 F.2d at 1024:

> The compact process is therefore to be invoked unless, applying the Cabazon test, it is determined that the state, "as a matter of criminal law and public policy, prohibit[s] [class III] gaming activity." § 2701(5). Absent such a conflict, the interests of the tribe and state are to be reconciled through the negotiation of a compact, and, if negotiations fail to achieve a compact and it is determined that the state did not negotiate in good faith, through the litigation and mediation process prescribed by section 2710(d)(7)(A) and (B).

Id. at 1030.

Although defendants insist that their position is not that the tribes are limited to negotiating "the exact games" that the state lottery operates, they argue that Wisconsin law must give express authorization for a "gaming activity" before it can be a proper subject of negotiation. Defendants offer no authority for distinguishing between the state's current lottery games and the activities proposed for negotiation by the tribes. Instead, the state

makes the bald statement that casino games "are of a wholly different character than a state lottery or on-track pari-mutual wagering." Defendants' reply brief at 17. The state's current attorney general has rejected the imposition of artificial distinctions within the term lottery, so long as the activity involves the elements of prize, chance and consideration and is not addressed explicitly by the constitutional amendments. Op. Att'y Gen. Wis. 10-91, slip op. at 5-7. I find no reason to impose similarly artificial categories in applying the Cabazon test and in interpreting the Indian Gaming Regulatory Act.

Defendants make one final argument in support of their contention that Congress never intended to permit tribes to conduct games not in operation in the state: a large part of the reasoning behind the compacts was to utilize the regulatory mechanisms for gaming already in place in the states. See S. Rep. No. 446 at 13-14. Defendants' argument has some merit, but it founders on the actual language used by Congress, and the source of that language. The term is "permits," not "operates" or "is in operation." Congress has stated that "permits" is to be interpreted under the Cabazon analysis. Therefore, the fact that a state permits an activity does not mean that the state has a mechanism in place to regulate the precise activities the tribes wish to offer. A state might not prohibit a particular Class III gaming activity, but simply allow it to be conducted, without taking any steps to restrict it in any way. Or a state might allow certain Class III gaming activity to be carried out by small charitable groups on very limited occasions without having any mechanism in place to regulate the same activity carried out on a large scale basis. See, e. g., Mashantucket Pequot Tribe, 913 F.2d 1024 (state that permitted "Las Vegas nights" to be operated by nonprofit organizations subject to statutory restrictions was required to negotiate over inclusion in tribal-state compact of banking games such as baccarat, chemin de fer, and blackjack, as well as roulette and poker that were played at such parties).

I conclude that the state is required to negotiate with plaintiffs over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law.

To ensure that states engage in negotiations with Indian tribes, the Indian Gaming Regulatory Act requires the states to negotiate in good faith with any tribes that request negotiation, and it gives federal courts jurisdiction over cases brought by Indian tribes arising from the failure of a state to enter into negotiations or to conduct such negotiations in good faith. 25 U.S.C. §2710(d)(3)(A) and (7)(A). If a state fails to negotiate in good faith the court may require it to conclude a compact within sixty days, §2710(d)(7)(B)(iii), and shall appoint a mediator to conclude a compact if negotiations are not successful, §2710(d)(7)(B)(iv). Pursuant to §2710(d)(7)(B)(iii) and the state's concession that it has failed to negotiate over activities I have now determined must be the subjects of negotiation, the state will be required to conclude a compact with each plaintiff within sixty days. If plaintiff Sokaogon objects to this order, it shall have seven days in which to make its objections known.

ORDER

IT IS ORDERED that defendants' motion to strike the affidavits of Rita Keshena, Milton Rosenberg and James Landru is GRANTED and defendants' motion for summary judgment is DENIED. FURTHER, IT IS ORDERED that pursuant to 25 U.S.C. §2710(d)(6)(B)(ii), the State of Wisconsin is REQUIRED to conclude a tribal-state class III gaming compact with plaintiff Lac du Flambeau Band of Lake Superior Chippewa Indians and with plaintiff Sokaogon Chippewa Community gaming compact within sixty (60) days from the date of this order. If plaintiff Sokaogon Chippewa Community objects to the order requiring the state to conclude a compact with it, it

is to make its objections known within seven (7) days of the date of this order.

Entered this 18th day of June, 1991.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; and the SOKAOGON CHIPPEWA COMMUNITY,

Plaintiffs,

OPINION and ORDER

v.

90-C-408-C

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Defendants.

This is a civil action for declaratory and injunctive relief in which two federally acknowledged Indian tribes seek enforcement of provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. In addition, the tribes seek to enjoin defendants from initiating any criminal process against them, their governing tribal councils, their casino employees, suppliers or patrons during the pendency of this action and thereafter.

Jurisdiction is invoked pursuant to 28 U.S.C. §1362 and 25 U.S.C. §2710(d)(7)(A)(i).

The case is before the court on plaintiffs' motion for a preliminary injunction prohibiting defendants from

initiating criminal process against plaintiffs for violation of state gambling laws.

I conclude that the state lacks authority to prosecute violations of the state's gambling laws on plaintiffs' reservations, either pursuant to the provisions of Pub. L. 280 incorporated in 18 U.S.C. §1162, or pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. and 18 U.S.C. §1166. Unless and until the state negotiates a tribal-state compact in which plaintiffs consent to the exercise of such jurisdiction, the United States has the exclusive authority to enforce violations on of state gambling laws on plaintiffs' reservations. However, I decline to grant the injunction sought by plaintiffs to enjoin defendants from prosecuting any future violations of the state gambling laws on the reservations. Plaintiffs can avoid any harm they might incur from being subjected to prosecution by a sovereign that lacks jurisdiction simply by refraining from engaging in criminal acts. They do not need an injunction.

For the purpose only of deciding this motion, I find that there is no dispute about the following findings of fact proposed by plaintiffs and uncontroverted by defendants.

FACTS

I. LAC DU FLAMBEAU BAND

The Lac du Flambeau Band of Lake Superior Chippewa Indians is an Indian tribe acknowledged by the United States in the treaty with the Chippewa of September 30, 1854, 10 Stat. 1109. The band occupies a reservation located primarily in Vilas County, Wisconsin.

The band has an approved tribal membership roll of 2,310 members. Most reservation residents live in households with income below the poverty level. Of the

on-reservation member population at Flambeau, 63% are unemployed. Of those employed, 23% have incomes below $7,000 a year.

The band exercises governmental authority over its reservation and its members through its Tribal Council. The band makes continuous efforts to provide employment opportunities for its members.

Pursuant to the powers set forth in the band's constitution, in January 1988, the Tribal Council adopted a comprehensive Gaming Ordinance that regulates the various forms of gaming conducted on the reservation.

On May 17, 1989, the band opened a gaming facility on federal trust lands within the reservation. The band owns and operates the casino itself. It does not contract with an outside management company.

Between May 17, 1989 and mid-February 1990 the casino employed approximately 24 to 29 persons. In May 1989 83% of the employees were tribal members; in February 1990 just under 80% of those employed were tribal members.

In the absence of the casino jobs, it is likely that the tribal member employees will not find replacement jobs, will be unemployed, and will be forced to rely on some form of public assistance relief from the state or federal government and from tribal social services programs.

The Lac du Flambeau Band supplies many essential governmental services such as housing, water, sewer and related sanitation services, education, medical, dental, psychological, counselling and sanitarium services. Its total annual operating expenditures for the provision of services and the operation of tribal government are approximately $4 million annually. Although it receives funds to operate its governmental programs and services from a variety of sources including the federal government,

its ability to provide a full range of services to its members is limited by restrictions on the use of the funds.

The band has only a few, very limited taxing opportunities within the reservation. Consequently, it tries to raise unrestricted funds to fill the unmet needs of its members through the leasing of tribal land, cigarette sales and licenses of various kinds, and the casino operation. Without casino revenue, the band will not be able to support tribal programs and services. Casino revenues are projected to produce over 15.79% of the General Fund revenues available for tribal expenditure in FY 1990. In fact, however, actual casino revenues have exceeded projections, and have accounted for a larger share of the General Fund revenues than originally anticipated.

Between May 17, 1989 and mid-February 1990, the following games have been played at the tribal casino: bingo-jack, bingo-letter, video machines, pull-tabs, quick bingo (20-20), poker and blackjack.

II. SOKAOGON CHIPPEWA COMMUNITY

The Sokaogon Chippewa Community is one of the original Lake Superior Chippewa Bands recognized in treaty. For many decades it was a so-called "lost tribe," subsisting in the ceded territory without benefit of a permanent home or the assistance of federal trusteeship. In the 1930s, the community received a small parcel of 1860 acres of land in Forest County, Wisconsin, which is its reservation home. Approximately 430 tribal members of a total membership of about 1,350 live on the Sokaogon Reservation. The reservation has almost no natural resources capable of producing income and it has no viable tax base. The tribe's unemployment rates exceed 85%.

Since at least 1987, the tribe has operated approximately 15 video poker facsimile games. In the

latter part of 1989 these machines were supplemented by four blackjack tables and some slot machines.

The Sokaogon gaming enterprise is managed and operated exclusively by tribal personnel. Until it was threatened with prosecution, it employed at least ten persons full-time (six men and four women) as well as part-time workers, and had a payroll of at least $10,000 per month. During the period of its operation, the enterprise generated net profits of over $15,000 a month in addition to its tribal payroll. The 12-month projection is that the enterprise will generate gross revenues of over $290,000 a year and support a tribal payroll of over $110,000 a year. The projected net profit in excess of $175,000 would provide the tribe with its major source of discretionary funds.

The Sokaogon Chippewa Community is the local government with direct and immediate responsibility for the welfare of its reservation residents. Its assets are slim. It is assisted by numerous programs funded by federal and state governments. However, all such funding must be strictly administered according to program plan. There is no allowance for emergency or the recognition of need extending beyond program coverage.

The gaming revenues afford the major source of funds that enable the Tribal Council to carry out its responsibility to minister to the needs of its residents.

The Sokaogon Community operated its gaming enterprise openly and with the full endorsement of local law enforcement officials until defendant Marvin threatened the enterprise with prosecution and seizure.

Continued closure of the enterprise for an extended period will relegate at least ten employees to unemployment and the relief rolls, and deprive the tribe of badly needed funding for essential programs. Closure of the enterprise for an extended period will also destroy the

patronage and business relationships that have been built up over a period of years, and will dissipate the training, confidence and business experience tribal members have acquired.

OPINION

I. INDIAN GAMING REGULATORY ACT

The background to this litigation is the 1988 Indian Gaming Regulatory Act, which establishes a comprehensive scheme for the regulation of gaming on Indian lands. The Act is a response to congressional concerns over the increasing reliance by Indian tribes on revenues from gaming activities conducted on Indian lands and the lack of clear standards or regulations for the conduct of such activities.

Under the Gaming Act, gaming is divided into three categories. Class I gaming includes social and traditional forms of Indian games played by individuals at pow wows and tribal ceremonies for minimal prizes. 25 U.S.C. §2703(6). Class I games are subject to exclusive tribal jurisdiction and regulation. 25 U.S.C. §2710(a)(1).

Class II gaming includes bingo, pull-tabs, lotto, tip-jars, punch boards, instant bingo, and other games similar to bingo. 25 U.S.C. §2703(7)(A)(i). Class II gaming is subject generally to the jurisdiction of a newly created National Indian Gaming Commission, 25 U.S.C. §2704(a) and (b)(1) and §2710(b)(1) through (c). In certain circumstances, tribes may regulate their own Class II gaming if they are licensed by the Commission. 25 U.S.C. §2710(c)(3) and (4).

Class III games are all forms of gaming that are neither class I nor Class II. 25 U.S.C. §2703(8). Class III games are lawful on Indian lands if the activities are authorized by a tribal ordinance or resolution that has

been approved by the Chairman of the National Indian Gaming Commission; if they are carried on within a state "that permits such gaming for any purpose by any person, organization or entity...." 25 U.S.C. §2710(d)(1)(A) and (B); and if they are played in conformance with a tribal-state compact entered into between the tribe and the state, 25 U.S.C. §2710(d)(1)(C).

Tribal-state negotiations for a Class III compact are initiated by tribal request. 25 U.S.C. §2710(d)(3)(A). Thereafter, the state must negotiate in good faith to enter into such a compact. Id. If a state fails to enter into negotiations with a tribe, or negotiates in bad faith, the Act authorizes the tribe to initiate litigation in federal court. If the court finds the state has failed to negotiate in good faith, it is to order the parties to conclude a compact within 60 days, and, failing that, to submit to a court-appointed mediator a compact that represents their last best offers, from which the mediator selects one. 25 U.S.C. §2710(d)(7)(B)(iv).

The structure of the Indian Gaming Regulatory Act conforms to the basic principle that the state and tribe negotiate as sovereigns. The Act acknowledges the inherent rights of the tribes and allows them to relinquish some of them through compacts. See remarks of Sen. Evans, 134 Cong. Rec. 3105 (1988).

II. THE PARTIES' POSITIONS

On this motion for preliminary injunction the plaintiffs are challenging only the jurisdiction of the state to prosecute them criminally for gambling violations. Although plaintiffs' suit is directed primarily to the claim that the state has failed to negotiate a class III compact in good faith, thereby entitling plaintiffs to come to federal court to initiate litigation against the state for bad faith negotiations, their motion is not directed to the state's sincerity or lack of sincerity in negotiating. They have

proposed no facts on that issue and defendants have not had a chance to be heard on it. I emphasize this point because plaintiffs have not made it completely clear in their submissions. Clarification of the issue in dispute is important to determining the basis for jurisdiction, the identification of the proper defendants, and the nature of the harms at stake.

Plaintiffs assert that the Indian Gaming Regulatory Act gives the United States exclusive jurisdiction over alleged violations of state gambling laws on Indian lands and that the State of Wisconsin's district attorneys lack jurisdiction to prosecute any violation of state gambling laws on Indian lands in the absence of a tribal-state compact. Plaintiffs urge the court to recognize this exclusive jurisdiction by enjoining the defendant district attorneys from initiating any criminal actions to enforce the state's gambling laws on the plaintiffs' reservations.

Defendants dispute plaintiffs' assertion that the Indian Gaming Regulatory Act took away the criminal jurisdiction over gambling on Indian lands that the State of Wisconsin possesses under Pub. L. 280, 18 U.S.C. §1162. They maintain that the state retains jurisdiction over Indian gambling that the defendant district attorneys may exercise.

Defendants argue, correctly, that the jurisdictional basis for this motion is 28 U.S.C. §1362, the Indian federal question statute, and not the Indian Gaming Regulatory Act. The issue arises under the supremacy clause of the United States Constitution. If plaintiffs are correct in their contention that the state has no jurisdiction to prosecute gambling under the Indian Gaming Regulatory Act, the defendant district attorneys would be violating the supremacy clause if they were to attempt to exercise jurisdiction over plaintiffs.

I turn next to the question whether Pub. L. 280 would authorize the state to exercise criminal jurisdiction

over plaintiffs' on-reservation gambling activities. Resolution of this question is material to interpreting the language of 18 U.S.C. §1166, the criminal penalty and enforcement provision of the Indian Gaming Regulatory Act, and to determining defendants' claim that the state retains its authority to bring criminal proceedings against the plaintiffs for violations of the state's gambling laws.

III. STATUS OF CASINO ACTIVITY UNDER PUBLIC LAW 280

A. Nature of Casino Activity

Neither side has submitted factual descriptions of the kinds of games that plaintiffs offer or intend to offer in their casinos. The parties concede, however, that most of the games fall into the class III category for which a compact is required. Plaintiffs do not deny that class III games are illegal under the Indian Gaming Regulatory Act in the absence of a tribal-state compact.

B. Public Law 280

In 1953 Wisconsin was one of six states (including the then territory of Alaska) to which Congress gave limited civil and general criminal jurisdiction in certain areas of Indian country within their borders. Act of August 15, 1953, Pub.L.No. 83-280, 67 Stat. 588, 18 U.S.C. §1162 and 28 U.S.C. §1360 (commonly known as Public Law 280). As a result, Wisconsin has criminal jurisdiction over offenses committed by or against Indians in all Indian country within the state, with the exception of the Menominee Reservation, "to the same extent that [it] has jurisdiction over offenses committed elsewhere within the State...." 18 U.S.C. §1162(a). "Indian country" includes all land within the limits of any Indian reservation under federal jurisdiction, all dependent Indian communities, and

all Indian allotments to which the Indian titles have not been extinguished. 18 U.S.C. §1151.

The civil jurisdiction given the Pub. L. 280 states was limited and specific. In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court made it clear that the law did not confer upon states and their subdivisions a general grant of power to tax personal property on Indian land. Rather, the grant of civil jurisdiction was intended primarily to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens.

Bryan has been read consistently as directing an analysis of the nature of the laws a state wishes to enforce in Indian country. The courts are to look beyond the state's characterization of a law as criminal or civil to determine whether the law is one that is prohibitory in nature, that is, intended to prohibit acts the state believes are inimical to the health and safety of its citizens or whether it is one that is essentially regulatory, that is, intended to regulate acts that the state permits in certain restricted circumstances. Under this criminal-prohibitory, civil-regulatory analysis, the State of Washington's fireworks laws were found to be prohibitory rather than regulatory. They outlawed completely the general possession and sale of dangerous fireworks, with certain limited exceptions, and were designed to promote the health and safety of the state's citizens. United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). Laws prohibiting bingo games have been found to be regulatory in nature in states that impose criminal penalties on persons who run unauthorized bingo games for profit, but permit such games when run by certain groups under state regulation. See, e.g., Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn.

1986); Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (W.D.Wis. 1981).

The civil-regulatory, criminal-prohibitory dichotomy derived from Bryan was adopted by the Supreme Court in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210 (1987). The Court held that two federally recognized Indian tribes could conduct high stakes bingo, draw poker, and other card games free from criminal prosecution by the State of California. The state had sued to stop the tribes' games under its gambling laws, which permitted bingo games only under certain very limited conditions and made violations of any of the conditions a misdemeanor. In concluding that the state could not enforce its criminal laws against gaming activities, the Court found it persuasive that the Court of Appeals for the Ninth Circuit had held the California gambling laws to be civil-regulatory. The Court found that the court of appeals had a "fair basis" for its conclusion.

> California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Govt. Code Ann. §8880 et seq. (West Supp. 1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal. Bus. & Prof. Code Ann. §§19400-19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under Cal. Penal Code Ann. §330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact.

Id. at 210.

Like California, Wisconsin does not prohibit all forms of gambling. The state's first constitution included an anti-lottery provision that prohibited the legislature from ever authorizing a lottery. Wis. Const., art. IV, §24. For more than a century, this provision was interpreted by the state courts and by the attorney general as prohibiting any game of chance involving the elements of prize, chance and consideration. However, in the last three decades, the electorate has approved amendments to the constitution that authorize the state to operate a lottery, with the proceeds going to property tax relief, Wis. Const. Art. 4, §24(6), Wis. Stat. §565.01 et seq., and permit state-licensed bingo games and raffles, Wis. Const. Art. 4, §24(3), Wis. Stat. ch. 163, and dog, horse, and snowmobile racing with on-track parimutuel betting, Wis. Const. Art. 4, §24(5), Wis. Stat. §562.001 et seq. The relevant provision of the state constitution now begins: "Except as provided in this section, the legislature shall never authorize any lottery...."

These amendments raise the question whether the state can continue to assert that any of its gambling laws are criminal-prohibitory, and therefore enforceable under Pub. L. 280. I conclude it cannot. Although defendants maintain that the amendments are carefully drawn exceptions to a strong state policy of opposition to gambling and that the kind of games plaintiffs intend to offer in their casinos can be readily distinguished from the narrow range of activities the state's electorate has voted to except from the constitutional ban on lotteries, defendants' position cannot be reconciled with the holding in Cabazon or with the broad scope of the constitutional amendments.

In Cabazon, the Court looked at California's policy toward gaming in general in reaching the conclusion that the policy was civil-regulatory in nature. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates, rather than prohibits gambling in

general and bingo in particular." California v. Cabazon Band, 480 U.S. at 211. In Wisconsin, as in California, the state permits such extensive gambling activity as to make it clear that its view of the activity in general is regulatory and not prohibitory. Cabazon establishes the proposition that in making the Pub. L. 280 analysis, the question is whether the state views the activity of gambling in general as so dangerous to the health and safety of its citizens that it must be wholly prohibited. "The shorthand test is whether the conduct at issue violates the State's public policy." Id. at 209. If it does not, the conduct cannot be enforced by the state.[1]

Wisconsin's public policy has been expressed by the electorate. The state's voters have approved referenda to amend the state's constitution to permit a wide range of gambling activity. The state has undertaken not just to permit gambling but to facilitate it through the institution of a state lottery. Having done so, the state can no longer argue that it has a public policy of opposition to any particular form of gambling activity.

Indeed, there is a strong argument to be made that when the electorate amended the constitution to allow a lottery, it eliminated any remaining constitutional prohibition against any form of gambling. Throughout Wisconsin's statehood, its courts have read the constitutional prohibition against "lotteries" as prohibiting any game involving the elements of prize, chance and consideration. See, e.g., Kayden Indus., Inc. v. Murphy,

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[1]Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987) is not to the contrary. In that case, the question was whether New Mexico's statutes permitting gambling on horse racing evidenced a state policy that would allow gambling on any kind of animal racing. The district court held that it did not, noting that New Mexico had carefully limited parimutuel betting to horse racing. Although defendants argue that Wisconsin's laws show similar narrow exceptions, a review of the law does not support their characterization.

34 Wis. 2d 718, 150 N.W.2d 447 (1967). For example, the state supreme court has read the anti-lottery provision to cover theater promotions, State ex rel. Cowie v. La Crosse Theater Co., 232 Wis. 153, 286 N.W. 707 (1939); mercantile promotions, State ex rel. Regez v. Blumer, 236 Wis. 129, 294 N.W. 491 (1940); charitable bingo, State ex rel. Trampe v. Multerer, 234 Wis. 50, 289 N.W. 600 (1940); and television games of chance, State v. Laven, 270 Wis. 524, 71 N.W.2d 287 (1955). The state's attorneys general have issued opinions to the effect that the prohibition against lotteries encompasses slot machines and pinball machines, 32 Op. Att'y Gen. Wis. 181 (1943), mechanical devices ringing at pre-set intervals to provide ticket purchases with free tickets, 28 Op. Att'y Gen. Wis. 457 (1939), and "Las Vegas Nights" (event at which guests purchase play money to use at gambling tables and then bid for prizes with their winnings), 70 Op. Att'y Gen. Wis. 59 (1981). Now that the electorate has voted to allow state-operated lotteries, it follows that it has voted for the elimination of the prohibition of any game involving the elements of prize, chance and consideration.

Defendant Hanaway has reached a contrary conclusion. In a recent opinion issued February 5, 1990, he argues that the term "lottery" as used in the state constitution was never intended to cover all of the different forms of gambling, specifically, betting against a bank as in blackjack, roulette, craps, chemin de fer, baccarat, and similar games, and playing gambling machines such as slot machines, video gambling machines, and similar devices. He concludes that, in approving a constitutional amendment to permit a state-run lottery, the voters intended to limit the types of permitted games to those requiring "tickets" in the conduct of the game, and that because casino-style gambling is not a lottery, the legislature is free to allow it in the state simply by repealing or modifying the criminal statutes that presently prohibit it.

I find this opinion difficult to square with the state's consistent treatment of lottery as an inclusive term of reference to any type of gambling involving chance, consideration and prize. In any event, it does not change my view that, with the passage of the amendment to the Wisconsin Constitution permitting a state lottery and parimutuel betting, the state expressed its view that gambling in and of itself is not a threat to the health and safety of its citizens, but an activity to be permitted subject to regulation. As a consequence, enforcement of gambling laws now falls into the civil-regulatory category over which the state has no jurisdiction under Pub. L. 280.

Whether this analysis of Pub. L. 280 has any relevance to the requirement in 25 U.S.C. §2710(d)(1)(c) that a particular gambling activity may be authorized by tribal-state compact only if it is carried on within a state "that permits such gaming for any purpose. . . . " is a matter on which I reserve comment expressly at this time.

IV. PREEMPTION OF STATE CRIMINAL JURISDICTION UNDER THE INDIAN GAMING REGULATORY ACT

Even if the state had not lost its Pub. L. 280 jurisdiction to prosecute violations of state gambling laws in Indian country, the passage of the Indian Gaming Regulatory Act has preempted it from exercising criminal jurisdiction over gambling activities on the reservations in the absence of a tribal-state compact that confers such authority on the state by agreement. 18 U.S.C. §1166(d) gives the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country." The statute reads in full as follows:

> Gambling in Indian Country. (a) Subject to subsection (c), for purposes of

Federal law, all State laws pertaining to licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include --

> (1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
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> (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal

> prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Despite the plain language of subsection (d), defendants contend that the state continues to have jurisdiction to prosecute Indian violations of state gambling laws. They argue that the United States has exclusive criminal jurisdiction over only those state gambling laws that are made applicable to Indian country under §1166; Wisconsin's gambling laws were made applicable to Indian country within this state under Pub. L. 280; therefore, the state retains its authority to enforce state laws on the reservations. Alternatively, defendants argue that the passage of Pub. L. 280 was the equivalent of consent by Wisconsin's Indian tribes to transfer criminal jurisdiction over gambling to the state. Neither argument stands up to close analysis.

As I have found, Wisconsin has lost its Pub. L. 280 authority to prosecute Indian gambling. Defendants' reading of §1166 would mean that Indian gambling within the state would be free from any enforcement: the state could not enforce its criminal laws because gambling is not a criminally prohibited activity under Pub. L. 280, and the federal government could not act because there would be no laws applicable to the reservations.[2]

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[2]Although it may seem anomalous that the same state gambling laws that cannot be enforced on the reservations by the state pursuant to Pub. L. 280 authority are made applicable to the reservations by 18 U.S.C. §1166, the explanation is that the

Defendants' argument rests on the faulty premise that Congress did not intend to include the Pub. L. 280 states in its carefully wrought scheme for regulating gambling in Indian country. In those six states, the applicability of state gambling laws would continue to be determined under the civil-regulatory, criminal-prohibitory dichotomy approved in Cabazon. This flies in the face of common sense. As both this case and Cabazon demonstrate, there is considerable confusion about the extent to which the gaming laws of the Pub. L. 280 states can be enforced by those states on Indian reservations. To let that confusion continue and, in effect, leave the Pub. L. 280 states out of the Gaming Act's coverage, would not advance the congressional purpose of developing a comprehensive, national scheme for regulating ongoing gaming activities on Indian reservations throughout the country. 25 U.S.C. §2701.

The congressional history shows that Congress was aware of the Cabazon case, see S. Rep. No. 100-446, 100th Cong., 2d Sess. 6 (1988), and aware that the Pub. L. 280 states were losing their authority to enforce their gambling laws in Indian country. As more of the Pub. L. 280 states adopted lotteries and permitted other forms of gambling in efforts to increase their revenues without raising taxes, Pub. L. 280 jurisdiction over Indian gambling was eroding rapidly. It would have been nonsensical for Congress to place any reliance on that legislation in its efforts to bring control and uniformity to Indian gambling.

There is even less force to defendants' second argument that the state retains jurisdiction over gambling violations by virtue of the exception in subdivision (d) for consensual transfer by a tribe of criminal jurisdiction with respect to gambling. Defendants offer no legislative

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state laws referred to in §1166 are in fact federal laws incorporating state laws. There is no question about the authority of the federal government to make and enforce laws on the Indian reservations.

history, statutory provision or case law that would support reading Pub. L. 280 as a law to which the Indians in Wisconsin "consented." In fact, the tribes had no say in the legislation. It was imposed upon them by Congress in its capacity of trustee over the nation's Indian tribes. The legislative history leaves no doubt that the consensual transfer provision in §1166(d) did not refer to the Pub. L. 280 transfer of jurisdiction by fiat, but to a recent Indian land claims settlement in Rhode Island and to similar settlements of Indian land controversies that might be reached in the future.

V. ELEMENTS OF PRELIMINARY INJUNCTION SHOWING

The parties agree that a movant seeking a preliminary injunction must establish the ultimate likelihood of success on the merits of its claim, the lack of an adequate remedy at law, irreparable harm if the injunction is not issued, the probability that it will suffer greater harm if the injunction does not issue than its opponent will suffer if the injunction does issue, and finally, that the public interest will not be disserved by the issuance of the injunction. Roland Machinery Co. v. Dresser Indus., 749 F.2d 380, 387-388 (7th Cir. 1984).

Plaintiffs argue that the irreparable harm they will suffer is clear from their showing of the poverty and lack of job opportunities on their reservations; that the harm to the defendants is minimal if the injunction issues, because the state showed no concern about the operation of the casinos from May 1989 to mid-February 1990; and that an injunction would not disserve the public interest but would be helping to carry out the congressional intent expressed in the Indian Gaming Regulatory Act.

Defendants see the controversy through a different prism. They do not deny that the casinos provide badly needed jobs and revenue for the reservations. However,

they maintain that casino activity is illegal in the absence of a tribal-state compact, and that plaintiffs cannot claim they are suffering irreparable harm by being denied the opportunity to engage in illegal activity. Furthermore, plaintiffs cannot claim that the harm they will suffer as a result of being denied an injunction is greater than the harm the state will suffer if plaintiffs are permitted to engage in illegal activities, or that the public interest will be served by entry of an injunction. Finally, defendants argue, plaintiffs have an adequate remedy at law: they can assert the exclusivity of federal jurisdiction over alleged gambling violations on Indian lands as a defense to any criminal prosecutions brought against them.

Defendants are correct that the tribes cannot satisfy the irreparable harm requirement by showing the harm to the tribes and their programs resulting from the loss of casino revenue. It is not only the threat of prosecution by the state that prevents plaintiffs from operating their casinos; it is the fact that the activities they would offer in the casinos are illegal under the Indian Gaming Regulatory Act unless they are authorized by tribal-state compacts. Even if plaintiffs succeed in obtaining an injunction prohibiting the state from prosecuting them, they cannot operate their casinos with impunity: they remain subject to prosecution by the United States Attorney for violations of the gaming act.

The only harm that can be attributed to defendants' threats of prosecution is the harm plaintiffs would suffer by being subjected to criminal prosecution by a sovereign that lacks jurisdiction over them. However, they will be vulnerable to such harm only if they choose to offer class III gaming activities on their reservations.

So stated, the request for a preliminary injunction becomes questionable. If plaintiffs do not intend to resume class III gambling, the threat of prosecution is of no actual consequence and plaintiffs' only viable claim of irreparable harm must fail. Plaintiffs have not alleged that defendants

have threatened to prosecute them for any acts committed previously, while the casinos were in operation. They do not contend that theirs is a situation in which they risk criminal prosecution because of a lack of clear standards, so that they might break the law unwittingly, see e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965) (state officials enjoined from prosecuting or threatening to prosecute plaintiffs for alleged violations of two Louisiana statutes that plaintiffs claimed were overbroad), or that their so-called illegal activity is actually constitutionally protected, see, e.g., Miller v. Civil City of South Bend, No. 88-3006 (7th Cir., May 24, 1990) (en banc) (city barred from enforcing unconstitutional Indiana law making non-obscene nude barroom dancing criminal).

On the other hand, if plaintiffs do intend to offer class III gambling before concluding a tribal-state compact, they will be in violation of the gaming law, and they are in no position to ask for equitable relief. It is a basic tenet of equity jurisprudence that a court may not aid the accomplishment of acts that would violate the law, or would otherwise disserve the public interest.

It is true that the "illegal" activity at issue is illegal only because it is not yet authorized by a tribal-state compact, and that it is not the kind of illegal activity that offends the state's public policy. It is also true that the state would be acting illegally if it tried to prosecute the tribes or their members or their employees, and that the plaintiffs would incur actual harm for which money damages would not be available were such prosecutions to take place.[3] Despite these considerations and despite the

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[3]The possibility that plaintiffs could be subjected to numerous criminal prosecutions brought in the absence of a good faith basis for jurisdiction distinguishes plaintiffs' situation from that in Younger v. Harris, 401 U.S. 37, 46 (1971), in which the Supreme Court held that undergoing a single criminal prosecution brought in good faith is not such a great and immediate harm as to justify federal court interference with the

strong showing the plaintiffs have made of ultimate success on the merits, I conclude that plaintiffs are in no position to seek equitable relief for any harm that would result from the state's illegal prosecution. Plaintiffs can avoid that harm by refraining from operating class III gambling in violation of federal gaming regulations.

Having reached this conclusion, I need not address defendants' contention that only the defendant district attorneys have the authority to prosecute plaintiffs and that any injunction should issue only against them.

ORDER

IT IS ORDERED that plaintiffs' motion for a preliminary injunction is DENIED.

Entered this 18th day of July, 1990.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

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prosecution.